No. 16062

United States Court of Appeals

for the Ninth Circuit

JAMES N. GREEAR, Appellant,

vs.

MARY SCHAAF GREEAR, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILED

SEP 19 1958

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—9-12-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

VARGAS, DILLON & BARTLETT,
and ALEX A. GARROWAY,
220 South Virginia Street,
Reno, Nevada,

For Appellant.

JAMES W. JOHNSON, JR.,
252 West First St.,
Reno, Nevada,

For Appellee. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

V.

By the laws of the State of Virginia, the interest upon a judgment runs at Six Per (6%) Cent per annum. [2]

Second Claim For Relief:

I.

Plaintiff alleges, that plaintiff is a citizen of the State of Virginia and defendant is a citizen of the State of Nevada.

II.

That on or about the 13th day of July, 1949, plaintiff and defendant for a valuable consideration, entered into an agreement in writing, a copy of which is attached hereto as Exhibit A.

III.

Plaintiff has duly performed all of the conditions of such agreement on her part.

IV.

Defendant has failed and neglected to perform the conditions of the agreement on his part in that he has failed to pay to the plaintiff the sum of $1106.05 due to plaintiff under the agreement, paragraph six thereof, although plaintiff has demanded payment thereof.

V.

That in accordance with paragraph four of said agreement defendant has failed and neglected to perform the conditions upon his part and has failed to pay to the plaintiff the sum of $27,600.00 due the

plaintiff under the agreement, as of the 5th day of March 1956, although plaintiff has demanded payment thereof.

VI.

All of the payments as aforesaid have accrued since June 5, 1952.

Wherefore plaintiff demands judgment in the sum of $10,357.34, plus interest and costs on the first claim for relief, and $1106.05 and $27,600.00 plus interests and costs of [3] this action, on the second claim for relief. [4]

/s/ JAMES W. JOHNSON, JR.
Attorney for Plaintiff.

EXHIBIT "A"

AGREEMENT

This Agreement, made in duplicate, this 13th day of July, A. D. 1949, by and between James N. Greear, Jr., hereinafter referred to as the husband, and Mary Schaaff Greear, hereinafter referred to as the wife, witnesseth:

Whereas the parties hereto are husband and wife, and unfortunate differences and disputes have arisen between them, and they are now living separate and apart; and

Whereas three children have been born of their marriage; namely, Mary Alese Greear Wilson, who is now of full age and married; James N. Greear, III, born January 22, 1930, and Betsy Gene Greear, born January 4, 1932; and

Exhibit "A"—(Continued)

Whereas the said parties are desirous of amicably settling all questions, rights, titles, interests and obligations in relation to any and all property now owned or hereafter acquired by either of them and in relation to the support, maintenance, education and custody of their said two minor children;

Now, Therefore, in consideration of the premises and in consideration of the covenants and agreements hereinafter more specifically set forth, each of the said parties renounces, quit-claims and conveys any right or title to any of the estate now owned or possessed by the other or that may be hereafter acquired in any way by the other; and the said husband does hereby, so far as the covenants and agreements hereinafter contained are or ought to be performed or observed by him, his heirs, executors or administrators, covenant with the said wife, her heirs, executors and administrators, and said wife does hereby, so far as the covenants and agreements hereinafter contained are or ought to be performed by her, her heirs, executors or administrators, covenant with the said husband, his heirs, executors and [5] administrators, in the manner following, that is to say:

1. The wife shall have the custody and control of their said minor children; namely, James N. Greear, III, and Betsy Gene Greear, with the right of the husband to visit the said children at any reasonable times and places.

2. The parties agree that as soon as practicable after the execution and delivery of this agreement,

Exhibit "A"—(Continued)

Lot 28, Square 1937, known as premises 3532 Edmunds Street, Northwest, District of Columbia, which is titled in their names as tenants by the entirety, shall be sold and conveyed by them and the wife shall receive one-half of the net proceeds thereof, as her sole and separate estate, and the husband shall receive the remaining one-half of the net proceeds thereof. The wife shall have sole possession and control of the said property until contracts have been made for repairs and renovations needed to make the same saleable, or until the same is sold and conveyed to the purchaser, if the husband and wife mutually agree to sell it without making any repairs or renovations. As soon as such contracts shall have been executed by the husband, the wife agrees to vacate the premises. The husband agrees to advance the money necessary to make such repairs and improvements and the cost of such repairs and improvements, including his advances therefor, shall be taken into consideration in determining the net proceeds from the sale of the said property; provided, however, that any and all contracts for such repairs and improvements and the amount or amounts to be incurred therefor shall be subject to the joint consent and approval of the husband and wife.

3. The husband hereby sells, sets over, transfers and assigns to the wife all of his right, title and interest in and to any and all household goods, furniture and chattels located [6] in and upon the said premises known as 3532 Edmunds Street,

Exhibit "A"—(Continued)

Northwest, District of Columbia, except the following personal articles belonging to the husband:

1. The large (9′ x 12′) oriental rug used in the dining room,

2. The antique bed, the bedside table, the straight chair, the rectangular table, and the chair set in the room he is now occupying,

3. The day bed in the back room on the second floor,

4. The walnut chest of drawers and mirror in the room he is now occupying,

5. The desk, desk chair, couch, arm chair in the study, including two (2) lamps purchased for this room at the same time that it was furnished,

6. One set of "hunt" dinner plates which were presented to him by Dr. Leibell,

7. One set of dinner plates of the Episcopal High School Centennial,

8. One red decanter and matching glasses given to him by Dr. Thomas Lowe,

9. Sets of cocktail and Old Fashion glasses presented to him by Drs. Herbst and Howell which are now in his possession,

10. Any pictures or photographs belonging to him personally, including the hunt photographs and the hunt prints that are not in the recreation room, and any college pictures or photographs of his friends,

Exhibit "A"—(Continued)

11. The small dining table and armchair now in the recreation room,

12. All of his clothing and personal belongings, including medical, hunt, and all books purchased by him (excluding Encyclopedia Britannica and Journeys through Book Land and other children's books) or presented to him by friends for his personal use, and his fishing tackle, guns, gun case and golf clubs,

13. The brass kettle standing by the fireplace in the sitting room which belongs to his family,

14. The mirror now in the back room on the second floor which goes with the day bed in Item 3,

15. Two (2) woolen laprobes presented to him by friends, [7]

16. All furniture in the recreation room except one chair,

17. The silver vase presented to him by Dr. John Wheeler,

18. The carving set and steak sets presented to him by Dr. John Allen Talbot,

19. All of the silver bread and butter plates presented to him by his family,

20. The mirror in the recreation room presented to him by Dr. McLeod,

21. The bed spread presented to him by Mrs. William Evans,

22. One of the end tables in the living room.

Exhibit "A"—(Continued)

The husband agrees to remove his said property from said premises by August 1, 1949, and the wife agrees not to place any unreasonable obstacles in the way thereof.

4. The husband promises and agrees to pay to the wife for her own support and maintenance the sum of Five Hundred ($500.00) Dollars per month on the fifth day of each and every month commencing as of the fifth day of June, 1949, and continuing during their joint lives as long as she remains unmarried to another, but the obligation of the husband to make such payments shall terminate as of the date of the wife's death or marriage to another, and shall also terminate upon the husband's death, without any liability on the part of his estate or personal representative, to make such payment after his death. Whenever the wife becomes obligated to pay an income tax thereon and the husband becomes entitled to an income tax deducation therefor, the said payment of Five Hundred ($500.00) Dollars per month shall be increased to Six Hundred ($600.00) Dollars per month and shall continue at the rate of Six Hundred ($600.00) Dollars during any period that the wife is required to pay an income tax thereon and the husband is entitled to an income tax deduction therefor. However, if and when the husband's annual "net income" (meaning by [8] that phrase his gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income, tax payments by him for that year) is less than Seventeen Thousand

Exhibit "A"—(Continued)

Five Hundred ($17,500.00) Dollars in any calendar year, the monthly payments to the wife for the succeeding calendar year shall be that proportion of Five Hundred ($500.00) Dollars or Six Hundred ($600) Dollars (whichever amount is then applicable) that Seventeen Thousand Five Hundred ($17,500) Dollars bears to the husband's annual "net income" during said immediately preceding calendar year in which his "net income" is less than Seventeen Thousand Five Hundred ($17,500) Dollars, but the minimum payments shall be Three Hundred ($300) Dollars per month as long as the husband's annual "net income" equals or exceeds Seven Thousand Two Hundred ($7,200) Dollars per calendar year, and whenever the husband's annual "net income" equals or exceeds Seventeen Thousand Five Hundred ($17,500) Dollars in any calendar year, the monthly payments to the wife for that year and each and every succeeding year in which the husband's annual "net income" equals or exceeds Seventeen Thousand Five Hundred ($17,500) Dollars shall be Five Hundred ($500) Dollars or Six Hundred ($600) Dollars per month (whichever amount is then applicable according to the above provisions in relation to income taxes thereon) on the fifth day of each and every month commencing as of the fifth day of January of each of the years involved. If, by reason of ill health, or any other cause, the husband's annual "net income" should be less than Seven Thousand Two Hundred ($7,200) Dollars per year, the rate of monthly payments by the husband to the wife shall be one-half

Exhibit "A"—(Continued)

of his annual "net income," except that if that event occurs at any time during the time the husband is obligated for the support, maintenance and education of their two minor children or either of [9] them, as hereinafter provided in paragraphs 5 and 6 of this agreement, the payments by the husband to the wife shall be reduced to one-third of his annual "net income" during the period of time that he is so obligated for the support, maintenance and education of their said children or either of them. Whenever the husband's annual "net income" is less than Seventeen Thousand Five Hundred ($17,-500.) Dollars in any calendar year or less than Seven Thousand Two Hundred ($7,200) Dollars in any calendar year, the husband shall furnish the wife, her agent or attorney, an itemized statement of his annual "net income" and shall permit the wife, her agent or attorney, to make a detailed examination and audit of his books and records and income tax returns for the calendar years involved for the purpose of determining the accuracy of the itemized statement furnished by the husband to the wife, her agent or attorney. The wife agrees to sign a joint income tax return with the husband, at his request, until such time as she is required to make a separate return and pay a separate income tax on the money paid by the husband to her.

5. The husband will pay directly to the college for tuition, books, the usual college fees and room and board at the college for James N. Greear, III, so long as he continues to be a student at Virginia

Exhibit "A"—(Continued)

Military Institute, or other college approved by the husband, and in addition, will pay for his medical and dental care and transportation to and from college, not exceeding twice a year each way, and will pay directly to James N. Greear, III, beginning as of July 5, 1949, the sum of Forty ($40) Dollars for his allowance, including clothing, on the fifth day of each month until July 5, 1950, and beginning as of July 5, 1950, the sum of Fifty-five ($55) Dollars therefor on the fifth day of each and every month until the end of the college year after he attains the age of twenty-one years, that is, until June 20, 1951, and [10] while the husband intends to help his son financially as long as he remains in college and maintains a satisfactory standing, the husband does not hereby obligate himself to do so after his son attains the age of twenty-one years, other than as above provided. If the husband fails to pay for the education and maintenance of James N. Greear, III, as above agreed, and the wife pays therefor, the husband promises and agrees to reimburse the wife for any and all payments made by her on account thereof, not exceeding the obligations assumed by the husband, as above provided.

6. The husband will pay directly to the school for tuition, books and the usual school fees for Betsy Gene Greear as long as she continues to be a student at the National Cathedral School for Girls, or other school approved by the husband, and thereafter to pay for tuition, books, the usual college fees and transportation to and from college, not

Exhibit "A"—(Continued)

exceeding twice a year each way, and, if she attends college outside of the District of Columbia, for her room and board, and, while she lives with her mother, during the period up to her twenty-first birthday that she is attending school or college, will pay her mother for her room and board the sum of Fifty ($50) Dollars per month beginning as of July 5, 1949, and, in addition will pay for her medical and dental care and will pay directly to Betsy Gene Greear beginning as of July 5, 1949, the additional sum of Fifty-five ($55) Dollars for her allowance, including clothing, on the fifth day of each month until the end of the college year after she attains the age of twenty-one years, that is, until June 30, 1953, and while the husband intends to help his said daughter financially so long as she remains in college and maintains a satisfactory standing, the husband does not hereby oblige himself to do so after his said daughter attains the age of twenty-one years, other than as above provided. If the husband fails to pay [11] for the education and maintenance of Betsy Gene Greear, as above agreed, and the wife pays therefor, the husband promises and agrees to re-imburse the wife for any and all payments made by her on account thereof, not exceeding the obligations assumed by the husband, as above provided.

7. The husband promises and agrees to have and keep the wife designated as the beneficiary of his National Service Life Insurance in the face amount of Ten Thousand ($10,000) Dollars and to have the

Exhibit "A"—(Continued)

wife designated irrevocably as the beneficiary of other insurance now on his life in the face amount of Fifteen Thousand ($15,000) Dollars, such policies to be selected by him, and to have their three children named the contingent beneficiaries, share and share alike, of each and all of the said policies, in the event the wife predeceases the husband. At the time he receives his share of the proceeds from the sale of the house as provided in paragraph 2 above, the husband promises and agrees to deliver possession to the wife of each and all of the policies so designating her beneficiary and their children contingent beneficiaries in the total amount of Twenty-five Thousand ($25,000) Dollars. (It is understood that this cannot be done until sufficient payment has been made on the loan at the Riggs National Bank to release the said policies.) And to keep and maintain each and all of the said policies in the aggregate sum of Twenty-Five Thousand ($25,000) Dollars in full force and effect by paying any and all premiums thereon when and as the same become due and payable. In the event the husband and wife are divorced, the husband promises and agrees to substitute other insurance now on his life in the face amount of Ten Thousand ($10,000) Dollars for his said National Service Life Insurance in the face amount of Ten Thousand ($10,000) Dollars and, upon the surrender by the wife to the husband of his said National Service [12] Life Insurance in the face amount of Ten Thousand ($10,000) Dollars, the husband promises and agrees to deliver possession to the wife of said

Exhibit "A"—(Continued)

other insurance now on his life in the face amount of Ten Thousand ($10,000) Dollars and, upon the surrender by the wife to the husband of his said National Service Life Insurance in the face amount of Ten Thousand ($10,000.00) Dollars, the husband promises and agrees to deliver possession to the wife of said other insurance now on his life in the face amount of Ten Thousand ($10,000) Dollars in which the wife is then designated irrevocably as the beneficiary in the face amount of Ten Thousand ($10,-000) Dollars, and their three children are designated contingent beneficiaries, share and share alike, in the event the wife predeceases the husband, and to keep and maintain such substituted life insurance in full force and effect by paying any and all premiums thereon when and as the same become due and payable.

8. The husband promises and agrees to pay any and all presently outstanding bills for gas, electricity, telephone, milk and groceries, excepting any portion of such bills that may have been incurred on and after June 5, 1949, which portion shall be payable by the wife, and the husband further promises and agrees to pay any unpaid taxes on the premises known as 3532 Edmunds St., Northwest, District of Columbia, and each and all of the following bills that may not have been already paid by him:

Virginia Military Institute.....$38.00
Cathedral School for Girls..... 19.00
Parkway Cleaners 75.25

Exhibit "A"—(Continued)

Gude	24.50
Spunds	342.16
Martin	12.17
Hintlian	169.07
Mary Elizabeth	120.25
Colonial Oil	22.20
Woodward and Lothrop	113.18
Jelleff	45.00
Huberts	126.60 [13]

The husband does not assume liability for the payment of any bills hereafter incurred in connection with the wife's occupancy of 3532 Edmunds Street, Northwest, or for any other bills hereafter incurred by the wife.

9. The wife assumes and agrees to make a separate return and to pay the personal property taxes that will accrue for the taxable year July 1, 1949, to June 30, 1950, and thereafter, against the personal property received by her under paragraph 3 of this agreement.

10. The husband promises to pay to Arthur J. Hilland, Esquire, the sum of One Thousand ($1,000.00) Dollars as and for a counsel fee for services rendered to the wife.

11. The husband assumes and, after consummation of the sale of the house under paragraph 2 above, agrees to apply his share of the proceeds from the sale of the house on the principal and interest of a Twenty-one Thousand ($21,000) Dollar promissory note, held by Riggs National Bank, of

Exhibit "A"—(Continued)

which he and the wife are joint makers, and the husband will assume sole liability for the payment of the balance, if any.

12. In consideration of the foregoing, the wife hereby waives, releases and renounces all claims, demands and causes of action which she now has or may hereafter have against the husband for any further support and maintenance and agrees to make no claim to the proceeds of any life or other insurance now or hereafter payable to the husband, his estate, personal representatives or to any beneficiaries in any way designated by him except as hereinbefore provided in paragraph 7 hereof.

13. Each party agrees that he or she will not contract any debts, charge or liability for which the other party might be held liable and that each party will at all times be ever free, harmless and indemnified from any and all debts, charges and [14] liabilities hereafter contracted by the other party.

14. Each of the parties hereto agrees that in the event of the death of the other, the surviving party hereby waives any and all dower, courtesy or marital rights that either party may have to share or participate in any real or personal property of the other at death.

15. Each party shall, upon the request of the other, execute, acknowledge and deliver any and all deeds or instruments of release or conveyance that may be necessary in order to enable the other to sell, convey or otherwise dispose of his or her own property, real or personal, including any and all

Exhibit "A"—(Continued)

property acquired by either of them under the provisions of this agreement, free from any apparent right or interest therein.

In Witness Whereof, the said parties have hereto set their hands and seals on the day and year aforesaid.

[Seal] /s/ JAMES N. GREEAR, JR.,
[Seal] /s/ MARY SCHAAFF GREEAR,

Witness:

/s/ G. BOWDOIN CRAIGHILL,
/s/ ARTHUR J. HILLAND.

District of Columbia—ss.

I, Elizabeth Maynard, a Notary Public in and for the District aforesaid, hereby certify that James N. Greear, Jr., who is personally well known to me as the person described in and who executed the foregoing agreement dated the 13th day of July, 1949, personally appeared before me in said District and acknowledged the said agreement to be his act and deed.

Given under my hand and seal this 13th day of July, 1949.

[Seal] /s/ ELIZABETH MAYNARD,
Notary Public, D. C. My Comsion expires: 9/14/53. [15]

District of Columbia—ss.

I, Genevieve M. Foreman, a Notary Public in and

Exhibit "A"—(Continued)

for the District aforesaid, hereby certify that Mary Schaaff Greear, who is personally well known to me as the person described in and who executed the foregoing agreement dated the 13th day of July, 1949, personally appeared before me in said District and acknowledged the said agreement to be her act and deed.

[Seal] /s/ GENEVIEVE M. FOREMAN,
Notary Public, D. C. My Commission expires: 9/1/52. [16]

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon James W. Johnson, Jr., plaintiff's attorney, whose address is 206 North Virginia Street, P. O. Box 316, Reno, Nevada, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] OLIVER F. PRATT,
Clerk of Court,
/s/ By BERNARD SUPERAF,
Deputy Clerk.

Date: April 17, 1956. [17]

Return on Service of Writ

Mary Schaaff Greear vs. James N. Greear, No. 1261.

United States of America,
District of Nevada—ss.

I hereby certify and return that I served the annexed Summons on the therein-named James N. Greear by handing to and leaving a true and correct copy thereof together with copy of Complaint and Agreement with Dr. James N. Greear personally at Room 302, Professional Bldg., 150 North Center Street, at Reno, Nevada in the said District at 10:45 a.m. on the 18th day of April, 1956.

/s/ CEDRIC E. STEWART,
United States Marshal. [18]

Marshal's fees $2.00.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause.]

ANSWER

For answer to the Complaint, defendant says:

First Claim For Relief

I.

It is denied that plaintiff is a citizen of the State of Virginia. The other averments of paragraph I are admitted.

II.

It is admitted that on February 23, 1955 judgment was entered in favor of plaintiff against this

defendant, in an action in the Circuit Court of Bath County, State of Virginia, in the amount of $10,-357.34, plus interest on specified amounts, and costs.

III.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the averment of paragraph III.

IV.

The averment of paragraph IV is denied. [19]

V.

The averment of paragraph V is admitted.

Second Claim For Relief

I.

It is denied that plaintiff is a citizen of Virginia. It is admitted that defendant is a citizen of Nevada.

II.

The averments of paragraph II are admitted.

III.

It is denied that all the conditions of said agreement have been performed.

IV.

The averments of paragraph IV are denied.

V.

It is denied that defendant owes plaintiff $28,200 as of the 5th day of April, 1956, and it is denied that defendant has failed and neglected to perform the conditions of said agreement on his part to such an extent as would result in said amount being owed by defendant to plaintiff as of April 5, 1956.

VI.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment of paragraph VI.

Separate Answer and Affirmative Defense

As a separate answer and affirmative defense to each of the plaintiff's alleged claims for relief, defendant says:

I.

He has paid to plaintiff the following amounts:

1954:	
February 3	$75.00
February 8	75.00
April 9	75.00 [20]
May 13	75.00
October 6	75.00
November 12	75.00
December 15	75.00
1955:	
January 15	$75.00
February 28	75.00
March 29	75.00
April 30	75.00
June 27	75.00
October 17	150.00

II.

Paragraph 4 of the agreement, Exhibit A, provides that payments by defendant under that agreement shall be determined in amount by the basis of

defendant's annual net income. Defendant says that in no year since July 5, 1950 has his annual net income, as determined under the laws of the State of Nevada (of which state defendant has been a citizen and resident since said date), been in such amount as to require payments in the maximum amount stated in said agreement, and defendant avers that his annual net income since said date and continuing until April, 1956, has been in an amount which would reduce the payments to be made by him under said agreement to the minimum amount specified in paragraph 4 thereof, which defendant believes, and therefore avers, is not the amount now being claimed by plaintiff in this action.

III.

Defendant avers that all the conditions precedent to indebtedness or obligation by this defendant under paragraph 6 of said agreement were not performed.

Wherefore, defendant prays that plaintiff take nothing by her Complaint and that defendant have judgment dismissing said Complaint and for his costs herein incurred.

VARGAS, DILLON & BARTLETT,
/s/ By ALEX A. GARROWAY,
Attorneys for Defendant. [21]

Acknowledgment of Service Attached.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

Pursuant to notice pretrial conference in the above entitled matter was had this 18th day of June, 1956, James W. Johnson, Jr., appearing for the plaintiff, and Alex A. Garroway of the law firm of Vargas, Dillon, Bartlett and Garroway appearing for the defendant.

Jurisdiction

This Court has jurisdiction under the provisions of Section 1441, Title 28, United States Code, there being a diversity of citizenship between the parties and the amount in controversy being over $3,000, exclusive of interest and costs.

Nature of the Case

This case grows out of a separation and property agreement made and entered into between the parties as husband and wife of date July 13, 1949, upon the judgment that was rendered thereon in the State of Virginia on the 23rd day of February, 1955, and the accruals of money payments alleged to be due under the terms of the agreement subsequent to the entry of the Virginia judgment.

Agreed Facts

The execution of the agreement attached to the complaint, and the entry of the Virginia judgment is admitted. It is also admitted that certain payments have been made by the [22] defendant to the plaintiff under the terms of the agreement, namely,

$1,125. The parties agree on the costs incident to the Virginia judgment, the sum of $99.20. It is also agreed that the defendant has paid nothing on plaintiff's judgment, and that under the terms of the agreement certain additional sums of money have accrued to plaintiff, the exact amount to be determined upon two facts, namely, the yearly net earnings of defendant plus the application of either plaintiff's or defendant's construction of the payment provisions of the contract. It is agreed that somewhere along the line defendant is to receive credit for the sum of $1,125.

Disputed Matters

The present controversy centers around the manner of computation of the moneys due from defendant to the plaintiff, and that in turn depends upon the construction of the terms of the agreement of July 13, 1949. It would appear that the Virginia Court construed that agreement in the Virginia action, in which action, the Court is advised, the defendant seriously contested. The Court does not have a copy of this judgment so cannot say at this time how that Court did construe the terms of the agreement. Time for appeal being past it would appear that the parties were bound by the Virginia interpretation. The plaintiff asserts that she has performed all of the conditions precedent to the enforcement of the agreement, and it would appear that the Virginia Court so found. The defendant, on the other hand, takes the position that the conditions were not performed, citing the placing of their child in a school he did not approve.

Comment

The Court at this point makes the following observations:

1. In this action and so far as the plaintiff seeks judgment for the amount of the Virginia judgment, plus costs and interest, the defendant is bound by the construction of the [23] agreement adopted by the Virginia Court.

2. That as to the sums of money alleged by plaintiff to have accrued under the terms of the agreement subsequent to the entry of the judgment the construction of the Virginia Court should also apply.

3. The parties have construed the provisions of the agreement each to his own advantage and on this basis have tentatively computed the amount of money due plaintiff, these figures naturally being at considerable variance.

4. The opposing methods of computation adopted by the parties rest upon their interpretation of the agreement relating to defendant's "net earnings".

5. The defendant raises the question of the effect of the community property law in relation to arriving at his net earnings, asserting that plaintiff makes her computations on defendant's total net earnings, whereas by reason of the community property law the starting point should be one-half of the total net earnings.

Computations

Since each party has a definite theory of how the

payments should be computed then it is a routine matter for each to prepare a chronological schedule of moneys due from defendant under the terms of the agreement as he or she may interpret its provisions, provided, of course, that the parties can agree as to an "earning" figure for the years involved.

Conclusion

So far as indicated at this time the entire matter will be submitted at time of trial to the Court for its determination solely upon the agreement and judgment herein referred to, no witnesses or other documentary evidence being contemplated. There being no questions of fact involved the determination of the case depends solely upon questions of law. Due to the somewhat peculiar factual background of this case this has [24] resulted in a rather unusual pretrial and the usual pretrial "order" is not as applicable as, for instance, in the usual negligence case. However, the order is entered in conventional form for what it is worth, the Court realizing that much that has been said is the product of the Court thinking out loud.

Order

Pursuant to discussion and stipulation of counsel and on the basis of the foregoing comment, it is Ordered as follows:

1. That the foregoing constitutes the pretrial order in this matter, subject to the right of respective counsel to suggest within ten days from this date any necessary or appropriate changes so as to

conform to the pretrial discussion. None Being Offered the Order Will Stand As Final and in Lieu of the Pleadings. Copies of any proposed changes must be served on counsel for the opposite party who shall have five days from receipt thereof to make and file his consent, or opposition, to such proposed changes, and/or to offer such amendments as deemed proper. It is suggested that counsel confer and agree on changes, reporting to the Court the (1) changes agreed on and proposed; (2) changes not agreed to.

2. That counsel file their memorandum of points and authorities on the law of the case as developed at the pretrial conference, which must also cover any potentially controversial question of admission of evidence, with the Court five (5) days prior to trial date.

3. That the paragraph I of the complaint be and it is hereby amended, pursuant to stipulation, by striking the word "Virginia" in line 13, and inserting in lieu thereof the words "District of Columbia."

4. The parties having waived a jury trial the matter is set down for trial before the Court on October 15th and 16th, 1956. [25]

5. That at such time as the "computations" of moneys due under the parties opposing theories have been prepared each shall deliver a copy to opposing counsel and to the Court.

6. That counsel make every effort to bring about an "out of court settlement" of this matter.

Dated at Carson City, Nevada, this 18th day of June, 1956.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed June 21, 1956. [26]

[Title of District Court and Cause.]

DECISION

The plaintiff here seeks to recover against the defendant on two separate claims. The first claim seeks recovery in the sum of $10,357.34 "plus interest on certain specified amounts on certain specified dates, and costs" based upon a judgment entered in the Circuit Court of Bath County, State of Virginia, on the 23rd day of February, 1955, which judgment itemizes the specific amounts and the specific dates from which interest is to be computed, the total of which is to be added to the sum of $10,357.34, together with costs in the amount of $99.20, and interest thereon at six (6%) percent per annum.

In her second claim plaintiff seeks recovery under the terms of a property settlement agreement entered into between her and her former husband, defendant herein, on the 13th day of July, 1949, (1) of the sum of $1106.05 advanced by her for the education of a daughter of the parties, Betsy Gene

Greear, which amount plaintiff alleges is now due her from the defendant under Paragraph 6 of the agreement, Exhibit 1; and (2) of the sum of $27,-600.00 alleged to be due for unpaid sums of money pursuant to Paragraph 4 of the agreement, Exhibit 1. [132]

It is apparent from the judgment above referred to, Exhibit 2, that it included all moneys due from all items mentioned in Paragraphs 4 and 6 of the agreement, to and including the month of May, 1952. Plaintiff's "second claim" concerns us only as it relates to the period subsequent to that time.

The following factual statement forms the backdrop of this domestic tragedy. Mary Schaff Greear, the plaintiff, and James N. Greear, Jr., the defendant, were formerly husband and wife, residing in Washington, D.C. Certain unfortunate differences resulted in their separation, and, on July 13, 1949, in Washington, D C., an agreement was executed by the parties, Exhibit 1, which settled their property rights and all matters pertaining to the support of the wife and the custody and support of the children. The defendant continued to live and practice medicine in Washington, D.C. for a year after the agreement was executed. Thereafter, in July of 1950, the defendant removed to Nevada where he established his domicile, obtained a divorce from the plaintiff, remarried, and has continued to be actively engaged in the practice of medicine. The defendant has continuously resided in Nevada since that time.

In June of 1952 the defendant was attending a medical meeting at Hot Springs in Bath County, Virginia, at which time the plaintiff commenced an action in that county to reduce certain of the amounts due under the agreement to judgment. Personal service was had on the defendant, and the Circuit Court of Bath County rendered judgment against the defendant on February 23, 1955, for the sum prayed for in the plaintiff's "first claim" of her complaint herein.

Paragraph 4 of the agreement in question, Exhibit 1, [133] provided, inter alia, for the payment to the plaintiff by the defendant of certain amounts of money to be computed on the basis of the defendant's "net income" on an annual basis. Net income is defined in the agreement as " * * * gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income tax payments for that year."

Paragraph 6 of the agreement further provides that the defendant pay certain educational expenses of the children and, specifically, for the educational expenses of a daughter, Betsy Gene, "If the school attended by her should be the school named in the agreement * * * or other school approved by the husband."

Pretrial conference was had herein, the Court entering its pretrial order on June 21, 1957. Under the title of "Agreed Facts" the following appears in the order:

"The execution of the agreement (Ex. 1) attached

to the complaint, and the entry of the Virginia judgment is admitted. It is also admitted that certain payments have been made by the defendant to the plaintiff under the terms of the agreement, namely, $1,125.00. The parties agree on the costs incident to the Virginia judgment, the sum of $99.20. It is also agreed that the defendant has paid nothing on plaintiff's judgment, and that under the terms of the agreement certain additional sums of money have accrued (subsequent to the period covered by the judgment) to plaintiff, the exact amount to be determined upon two facts, namely, the yearly net earnings of defendant plus the application of either the plaintiff's or [134] defendant's construction of the payment provisions of the contract (Ex. 1, Para. 4). It is agreed that somewhere along the line defendant is to receive credit for the sum of $1,125.00."

The pretrial order, under the title "Disputed Matters," continues as follows:

"The present controversy centers around the manner of computation of the moneys due from defendant to plaintiff, and that in turn depends upon the construction of the terms of the agreement of July 13, 1949, (Ex. 1)." (Note: The writer has inserted the matters in brackets wherever such appear in the foregoing quotes from the pretrial order).

Now to the respective contentions of the parties. As to plaintiff's first claim based on the Virginia

judgment the defendant admits the same and offers no defense. His time for appeal in Virginia being long since past the matters therein passed upon are res adjudicata and binding on this Court. Defendant admits that he has paid nothing in satisfaction of the Virginia judgment. We find for plaintiff on her first claim.

Plaintiff's second claim covers (1) the amounts claimed due under the provisions of Paragraph 4 of the agreement, Ex. 1; and (2) reimbursement for sums of money totalling $1,106.05 advanced by her for Betsy Gene's education, for which she claims reimbursement under paragraph 4 of the agreement.

We can dispose of the educational expense item provided for in paragraph 4 by merely observing that the plaintiff offered no proof to sustain her claim of reimbursement in [135] the sum of $1,106.-05, so as to this item we find for the defendant.

Having disposed of the judgment, and education, claims we now turn to the real problem in the case, plaintiff's claim for $27,600.00 under paragraph 4 of the agreement arising subsequent to the period covered by the Virginia judgment. It is conceded by the defendant that there are certain moneys due from him to the plaintiff since the date of those payments merged in the Virginia judgment, but he denies that he owes the amount claimed by the plaintiff. This difference of opinion between the parties is due to the different interpretations placed by the parties on the expression "net income" ap-

pearing in paragraph 4, and which is therein defined as "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income payments for that year." Accepting the construction of the Virginia Court we hold that the payments due for any one year are determined by the "net" income of the preceding year.

Which computation to accept for the purpose of determining the moneys now due from the defendant to the plaintiff becomes now the problem of the Court. It is one of interpretation of paragraph 4 of the agreement. What did the parties intend at the time of the execution of the agreement? Did the agreement as written express the intention of the parties? We think it is clear as to what the parties intended, and further, that the wording of paragraph 4 faithfully recites such intention.

It appears from the testimony that during his several years of practice in Washington, D. C., while married to plaintiff, the procedure was to deduct from the gross joint earnings of the partnership medical practice such items as [136] are shown on Ex. 5, after which the remaining "net" was divided between the medical partners on an agreed percentage. Plaintiff contends that this same procedure should now be followed in arriving at the "net" of defendant's Nevada practice. Plaintiff contends that defendant's "net" is to be determined on the basis of the Washington practice as shown in Ex. 5. There is no dispute between the parties as

to the basic figures used in the computations set forth in Exhibits 4 and 5.

Ex. 4, prepared on the defendant's theory of arriving at the net of his Nevada practice, for the purposes of computing payments due the plaintiff under the provisions of paragraph 4 of the agreement, is as follows:

1952	1953	1954	1955
$9,127.72	$14,338.51	$16,022.32	$16,986.09

Using the same basic figures but eliminating such items as dues and memberships, entertainment, medical journals, insurance, interest, depreciation, and automobile expense, which were not deducted from the gross of the partnership practice in Washington, D. C., thus applying the Washington formula to the Nevada practice we come up with the "net" as shown in Ex. 5, namely:

1952	1953	1954	1955
$13,105.59	$18,234.23	$21,685.30	$23,845.92

We are of the opinion that plaintiff is correct in her assertion that the formula used in Ex. 5 is to be applied in determining the defendant's "net" annual income for the purpose of computing the amounts due her under paragraph 4 of the agreement. We therefore reject the formula proposed by defendant as used in arriving at the "net" annual income as shown in Ex. 4. We arrive at this conclusion on the theory that the parties entered into the agreement using [137] the Washington practice and procedure as the "yardstick." Indeed, it does

not appear that defendant contested the application of such "yardstick" in the Virginia suit, but if he did it was disregarded by the Court. Regardless of the partnership practice of deducting only certain limited items it would appear with some logic that in the Virginia action defendant could have advanced the theory that he had certain other deductible items of expense over and above those used in the partnership practice, namely the type of deductions which he now seeks to assert in the present action. We feel that our conclusion in this respect is buttressed by the manner in which the term "net income" was anchored into the agreement, it being there defined as "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income payments for that year." (Underscoring ours.)

Defendant asserts that under the law of the State of Nevada, (N.R.S. 123.220) one-half of his earnings and income vested in his present wife and therefore only one-half of his earnings, medical and otherwise, should be used as the base for computing his net worth. Without going into detailed discussion on this point, and we concede that there can be much academic argument, we reject defendant's contention on this score. By way of illustrating our thinking we cite Alexander v. Alexander, 158 F2 492, and Hutchinson v. Hutchinson, 119 P2 214. It is obvious that at the time of the execution of the separation agreement the parties did not have in contemplation the vagaries of the law of forty-eight states, nor will this Court write them into the

agreement even though the argument is made by defendant's counsel that the sacred provisions of the Nevada community property law should be upheld. It may [138] be here said that the Court is concerned only with a determination of the rights of the parties based upon the Virginia judgment and the property agreement. At this point we do not think community property law enters into the picture. What might be the effect of raising that issue after judgment, and at such time as the plaintiff might attempt to satisfy her judgment, is a problem for another day.

In conclusion it is the opinion of the Court that the plaintiff have judgment as prayed for, save and except as to the $1,106.05 item she seeks to recover under paragraph 4 of the agreement by reason of expense of education of Betsy Gene, which is denied for the reason hereinabove recited, namely, lack of proof.

The defendant is to receive credit on that part of the judgment entered on plaintiff's "second claim" in the amount of $1,125.00, said payments having been made in the years 1954 and 1955 as indicated in defendant's answer by way of "separate answer and affirmative defense."

Counsel for plaintiff are directed to prepare, serve on opposing counsel, and lodge with the Clerk of the Court within twenty (20) days from the date hereof, consistent with this opinion, their proposed findings of fact, conclusions of law and proposed form of judgment. Counsel are directed, in making

such findings, conclusions and judgment to schedule in detail all computations of amounts and to clearly set forth the formulae used. Within ten (10) days thereafter counsel for defendant will serve on opposing counsel, and lodge with the Clerk of the Court such objections to said findings, conclusions and judgment as they may deem proper. [139]

Plaintiff is awarded her costs herein incurred.

Dated at Carson City, Nevada, this 30th day of December, 1957.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed December 30, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The Court finds from the evidence as follows:

1. The plaintiff is a citizen of the District of Columbia and the defendant is a citizen of the State of Nevada, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. Plaintiff and defendant were formerly husband and wife, residing in Washington, District of Columbia. Unfortunate differences resulted in their

separation, and on July 13, 1949, in Washington, District of Columbia, they entered into a written agreement which settled their property rights and all matters pertaining to the support of the plaintiff and the custody and support of the minor children of the plaintiff and defendant. The defendant continued to live and practiced medicine in Washington, District of Columbia, for a year after the agreement was executed. Thereafter, in July, 1950, the defendant removed to Nevada, where he established his domicile, obtained a divorce from the plaintiff, remarried and has continued to reside and practice medicine in Nevada since that time.

3. In June of 1952, the defendant was in Hot Springs, Bath County, State of Virginia, and at that time and place the plaintiff commenced an action to reduce certain of the amounts due under the agreement to a judgment. Personal service was had on the defendant, and the Circuit Court of Bath County, State of Virginia, rendered judgment against the defendant on February 23, 1955, for the sum of Ten Thousand Three Hundred Fifty-Seven Dollars Thirty-Four Cents ($10,357.34) plus interest on specified amounts from specified dates and costs amounting to Ninety-Nine Dollars Twenty Cents [141] ($99.20). The said judgment with interest thereon at the rate of six percent (6%) per annum as provided by the laws of Virginia, computed to February 1, 1958, together with the costs in the amount of Ninety-Nine Dollars Twenty Cents ($99.20), amounts to Fourteen Thousand Four Hundred Sixty-Six Dollars Thirty-Four Cents

($14,466.34) at this time. The defendant admits the said judgment, offers no defense thereto, and admits that he has paid nothing in satisfaction thereof.

4. The plaintiff offered no proof to sustain her claim of reimbursement for the sum of Eleven Hundred Six Dollars Five Cents ($1,106.05) advanced by her for Betsy Gene Greear's education and support.

5. The agreement of July 13, 1949, provides that the payments due from the defendant to the plaintiff for any one year are to be determined by the "net" income of the preceding year. The plaintiff and defendant intended to express their intention, and did express their intention, in paragraph 4 of their said agreement concerning the matter of determining the amounts of money to be paid by the defendant to the plaintiff.

6. During the defendant's years of practice in Washington, District of Columbia, and while he was married to the plaintiff, the procedure was to deduct from the gross joint earnings of the partnership medical practice in which he and others were engaged, such items as are shown in Exhibit 5, after which the remaining "net" was divided among the medical partners on an agreed percentage basis. There is no dispute between the plaintiff and defendant as to the basic figures used in the computations set forth in Exhibits 4 and 5. Using the basic figures, but eliminating such items as dues and memberships, entertainment, medical journals, insurance, interest, depreciation, and automobile ex-

pense, which were not deducted from the gross receipts of the partnership practice in Washington, District of Columbia, thus applying the Washington formula to the Nevada practice, the defendant's "net" income as shown in Exhibit 5, has been as follows:

1952	1953	1954	1955
$13,105.59	$18,234.23	$21,685.30	$23,845.92

The parties entered into the agreement of July 13, 1949, using the Washington practice and procedure as the "yardstick." The term "net income" was anchored into the agreement, it being there defined as "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income payments for that year."

7. At the time of the execution of the agreement of July 13, 1949, the plaintiff and defendant did not have in contemplation the vagaries of the law of forty-eight (48) states.

8. The plaintiff has proved her claims as set forth in her complaint filed herein, save and except as to the item of Eleven Hundred Six Dollars Five Cents ($1,106.05) which she seeks to recover under paragraph 6 of the agreement by reason of the expense of the education of Betsy Gene Greear, the minor daughter of the plaintiff and defendant, as to which the plaintiff offered no proof.

9. The defendant offered no proof that his income fell below Seventeen Thousand Five Hundred Dollars ($17,500.00) in the calendar year 1951, and

offered no proof that he paid anything on account of the Six Hundred Dollars ($600.00) per month that accrued and became payable from him to the plaintiff during the seven (7) months, June to December, 1952. Accordingly, the sum of Four Thousand Two Hundred Dollars ($4,200.00) is due and payable for that period.

10. The defendant owes the plaintiff Four Hundred Forty-Nine Dollars Forty Cents ($449.40) per month for the twelve-month period January to December, 1953, or a total of Five Thousand Three Hundred Ninety-Two Dollars Eighty Cents ($5,392.80), he having paid nothing to the plaintiff on account of the amounts that accrued and became payable during that calendar year.

11. The defendant owes the plaintiff Six Hundred Dollars ($600.00) per month for the twelve-month period January to December, 1954, and has paid eight (8) payments of Seventy-Five Dollars ($75.00) each or a total of Six Hundred Dollars ($600.00) on account thereof, leaving an unpaid balance of Sixty-Six Hundred Dollars ($6,600.00) for the calendar year 1954.

12. The defendant owes the plaintiff Six Hundred Dollars ($600.00) per month for the twelve-month period January to December, 1955, and has paid [143] the plaintiff five (5) payments of Seventy-Five Dollars ($75.00) each, and one (1) payment of One Hundred Fifty Dollars ($150.00) on account thereof, leaving an unpaid balance of

Six Thousand Six Hundred Seventy-Five Dollars ($6,675.00) due and owing for the calendar year 1955.

13. The defendant owes the plaintiff Six Hundred Dollars ($600.00) per month for the four-month period January to April, 1956, or a total of Two Thousand Four Hundred Dollars ($2,400.00) and has not made any payment to the plaintiff on account thereof.

14. The defendant owes the plaintiff Fourteen Thousand Four Hundred Sixty-Six Dollars Thirty-Four Cents ($14,466.34) on account of the Virginia judgment, including interest computed to February 1, 1958, at the rate of six percent (6%) per annum and court costs in the Virginia court in the amount of Ninety-Nine Dollars Twenty Cents ($99.20).

Conclusions of Law

From the foregoing findings of fact, the Court concludes as follows:

1. This Court has jurisdiction of the parties and subject matter of this action.

2. The payments due from the defendant to the plaintiff for any one year are determinable by the "net" income of the preceding year.

3. The defendant's "net" income should be determined on the basis of the Washington practice as shown in Exhibit 5, and the formula proposed by the defendant as shown in Exhibit 4 should be rejected.

4. the Nevada community property law does not enter into the case at this stage of the case.

5. The plaintiff is entitled to judgment against the defendant in the total sum of Thirty-Nine Thousand Seven Hundred Thirty-Four Dollars Fourteen Cents ($39,734.14) with interest at the rate of six percent (6%) per annum on each of the amounts included in that total amount from their respective due dates, and her costs herein incurred.

Entered at Carson City, Nevada, this 28th day of January, 1958.

/s/ JOHN R. ROSS,
United States District Judge.

Acknowledgment of Service Attached. [145]

[Endorsed]: Filed January 28, 1958.

In the United States District Court
for the District of Nevada

Civil Action No. 1261

MARY SCHAAFF GREEAR, Plaintiff,

vs.

JAMES N. GREEAR, Defendant.

JUDGMENT

This action came on to be heard, and thereupon, upon consideration thereof, and the findings of fact and conclusions of law entered herein this day, it is,

by the Court, this 28th day of January, 1958, adjudged as follows:

That the plaintiff have judgment against and recover of and from the defendant the sum of Thirty-Nine Thousand Seven Hundred Thirty-Four Dollars Fourteen Cents ($39,734.14) with interest at the rate of six percent (6%) per annum on Fourteen Thousand Four Hundred Sixty-Six Dollars Thirty-Three Cents ($14,466.33) from the date of this judgment until paid, on Four Thousand Two Hundred Dollars ($4,200.00) from September 15, 1952, until paid, on Five Thousand Three Hundred Ninety-Two Dollars Eighty Cents ($5,392.80) from July 1, 1953, until paid, on Six Thousand Six Hundred Dollars ($6,600.00) from July 1, 1954, until paid, on Six Thousand Six Hundred Seventy-Five Dollars ($6,675.00) from July 1, 1955, until paid, and on Twenty-Four Hundred Dollars ($2,400.00) from March 1, 1956, until paid, together with her costs herein incurred, and the plaintiff shall have execution for the said principal amount of this judgment, interest thereon as aforesaid, and costs of this action.

/s/ JOHN R. ROSS,
United States District Judge.

Acknowledgment of Service Attached. [147]

[Endorsed]: Filed January 28, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant hereby moves the Court for a new trial for the reason that there are errors of fact and of law in the Findings of Fact and Conclusions of Law and that the Judgment entered January 29, 1958, is erroneous.

Defendant also moves the Court to amend the Findings of Fact and Conclusions of Law in the following respects:

1. Amend Finding of Fact No. 6 so that it will include as items of deduction to determine net income dues and memberships, entertainment, medical journals, insurance, interest, depreciation and automobile expenses.

2. Amend Findings of Fact No. 7 because it is indefinite and erroneous in fact and in law.

3. Amend Finding of Fact No. 8 by striking therefrom the following, "The plaintiff has proven her claims as set forth in her complaint filed herein," for the reason that the same is erroneous in fact and in law.

4. Amend all the calculations of amounts owing by defendant to plaintiff for the years 1953, 1954, and 1955 for the [149] reason that they are based upon alleged amounts of income received by defendant which were in fact not received by him and the

Court ignored the application of the Community Property Law of the State of Nevada in arriving at those amounts of alleged income.

5. Striking completely Conclusion of Law No. 3.

6. Striking completely Conclusion of Law No. 4.

7. Amend Conclusion of Law No. 5 by striking the amount therein stated and inserting an amount determinable by the application of the Community Property Law of the State of Nevada and by the inclusion as deductible items the expenses referred to in the foregoing objection to Finding of Fact No. 6.

February 3, 1958.

VARGAS, DILLON & BARTLETT,
/s/ By ALEX. A. GARROWAY,
Attorneys for Defendant. [150]

Affidavit of Service by Mail Attached. [151]

[Endorsed]: Filed February 4, 1958.

In the United States District Court
for the District of Nevada

No. 1261

MARY SCHAAFF GREEAR, Plaintiff,

vs.

JAMES N. GREEAR, Defendant.

ORDER DENYING MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND MOTION FOR NEW TRIAL

The defendant's motion to amend findings of fact and conclusions of law, and motion for a new trial, came on the 12th day of March, 1958, for hearing and argument, James W. Johnson, Jr., appearing for the plaintiff, and Alex A. Garroway appearing for the defendant; and the motions being argued and submitted to the Court for ruling; now, therefore, and good cause appearing, it is

Ordered, that the defendant's motion to amend findings of fact and conclusions of law be and the same is hereby denied; and it is

Further Ordered, that the defendant's motion for a new trial be and the same is hereby denied.

Dated at Carson City, Nevada, this 27th day of March, 1958.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed March 27, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

James N. Greear, Jr., defendant, hereby appeals to the Court of Appeals of the Ninth Circuit from the judgment entered in this case March 27, 1958.

Dated: April 21, 1958.

VARGAS, DILLON & BARTLETT,
/s/ ALEX A. GARROWAY,
Attorneys for Defendant. [154]

Affidavit of Service by Mail Attached. [155]

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANT

1. The ownership of personal property is determined by the law of the domicile of the owner.

2. Under the law of the State of Nevada, the earning power of a husband is owned by the community of husband and wife domiciled therein, and the wife is the immediate owner at its acquisition of one-half of the product of the husband's earning power; the husband owns only the other half. The community has the nature of a partnership.

3. The law of Nevada above stated must be applied first to determine appellant's gross income from all sources. Thereafter, the calculation can be

made as to the payments owing from appellant to appellee under agreement Exhibit 1.

4. The determination of "usual ordinary and reasonable office expenses" of appellant should include dues and memberships, entertainment, medical journals, insurance, interest, depreciation, and automobile expense. [159]

Contents of Record

The record on appeal shall comprise the following:

1. Complaint and summons.
2. Answer.
3. Pre-trial order.
4. Transcript of testimony.
5. Exhibit 1 (agreement dated July 13, 1949).
6. Exhibit 4 (summary of income, with letter of accountant dated February 27, 1957).
7. Exhibit 5 (summary of income, with letter of accountant dated March 3, 1957).
8. Decision filed December 30, 1957.
9. Findings of Fact and Conclusions of Law.
10. Judgment entered January 28, 1958.
11. Motion to Amend Findings of Fact and Conclusions of Law and Motion for New Trial.
12. Order denying motions to amend and for new trial.

VARGAS, DILLON & BARTLETT,
/s/ ALEX. A. GARROWAY,
Attorneys for Appellant. [160]

Affidavit of Service by Mail Attached. [161]

[Endorsed]: Filed May 16, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of docket entries and court minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of June, 1958.

[Seal] OLIVER F. PRATT,
Clerk,

/s/ By J. P. TODRIN,
Chief Deputy Clerk. [158]

In the United States District Court, for the District of Nevada

No. 1261

MARY SCHAAF GREEAR, Plaintiff,

vs.

JAMES N. GREEAR, JR., Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Hon. John R. Ross, Judge.

Carson City, Nevada
March 5, 1957

Be It Remembered, That the above-entitled matter came on for trial before the Court, sitting without a jury, on Tuesday, the 5th of March, 1957, at Carson City, Nevada.

Appearances: James W. Johnson, Arthur Hilland, Attorneys for Plaintiff. John C. Bartlett, Alex Garroway, Attorneys for Defendant.

The following proceedings were had:

The Court: Miss Reporter, let your records show that this is the time set for trial before the Court and without a jury, in the matter of Greear vs. Greear, No. 1261.

As the Court recalls from previous discussion and the pre-trial order in this matter, the matters to be presented are rather simple, at least, the order covered is rather circumspect. The problem seems to be the manner of the computation of the [48] earnings of the defendant, in relation to the agreement of July 15, 1949. Reversing it, what is the construc-

tion of that agreement as to the net earnings of the defendant subsequent to the entry of the judgment.

If you have any discussion for the moment, prior to going into the merits of the matter, to bring this matter more to a focus, to save our time, I will be very glad to hear from either or all of counsel. As I understand, there are to be no witnesses presented.

Mr. Johnson: I do not know as that is necessarily true, your Honor. Whether or not there are to be any witnesses presented, I really do not know.

The Court: I just assumed that at the time of the pretrial, but, of course, you have latitude in that respect, but it would appear to me the matters the Court would be interested in would be basically some information concerning the earnings of the defendant and any subsequent agreements or decree of the Court that might have a bearing on it.

Mr. Garroway: One of the items claimed is $1106, which is based on the 6th paragraph in the agreement and has to do with the expenses of education of one of the daughters of the parties, and that may be the point where we will need some testimony. Dr. Greear is here and I am wondering if maybe that point might be taken up first, so if we need his testimony it can be obtained and he may be freed to go back to his office or [49] any hospital work.

The Court: Of course you can present as many witnesses as you see fit on any of the issues involved. This suggestion that Dr. Greear be permitted to testify is properly made.

Mr. Johnson: May it please the Court, I have

with me the original agreement over which this matter has been brought to trial. I should like, without objection, to introduce that in evidence. This is the original signed agreement in Washington. I also have exemplified copy of the Virginia judgment and I also have exemplified copy of the pleadings in the State of Virginia, which I should like to offer in evidence, which will be, perhaps, the basis of some of our argument even on the point which Mr. Garroway has just referred to.

Mr. Garroway: No objection.

Mr. Johnson: I ask that the agreement be marked plaintiff's Exhibit 1.

The Court: The agreement of the parties, dated July 13, 1949, will be admitted in evidence as plaintiff's Exhibit 1.

> [Note: Exhibit 1—"Agreement" is the same as Exhibit A attached to Complaint, set out at pages 5-20 of this printed record.]

Mr. Johnson: I would like, without objection—I have counsel—I would like to request the admission of exemplified copy of the judgment in the Virginia court in the case of Mary Schaaf Greear vs. James N. Greear, as plaintiff's Exhibit.

The Court: The offer will be received in evidence as plaintiff's Exhibit 2. [50]

Mr. Johnson: I would like, without objection to admit as plaintiff's Exhibit No. 3, Motion for Judgment, Itemized Statement and two Opinions of the Court in the State of Virginia, relative to this matter. The dates of the Opinions, the first one October 8, 1954, and January 17, 1955.

The Court: The offer will be received in evidence as plaintiff's Exhibit 3.

Mr. Bartlett: Your Honor, we do not have any copies of these particular documents. May we have photo copies made, if it is possible for the clerk to have photo copies made?

Mr. Johnson: I am sorry, your Honor, I only have one exemplified copy. I probably should have had some made, but I just didn't.

The Court: Perhaps it would be more convenient to have the clerk have the copies made and you can do that at the expense of yourself.

Mr. Bartlett: Yes sir.

Mr. Johnson: May it please the Court, I am wondering if counsel would stipulate that the defendant became a citizen of Nevada and became divorced from the plaintiff in this action in 1950 and remarried in 1951?

Mr. Garroway: That is correct.

The Court: Will you state that again, please?

Mr. Johnson: That the defendant, James N. Greear, came here for divorce to the State of Nevada in 1950 and he remarried [51] in 1951.

The Court: That statement is stipulated to as being qualified, counsel?

Mr. Garroway: That is correct.

Mr. Johnson: That is all we have to offer, your Honor.

The Court: That is the plaintiff's case?

Mr. Johnson: That is the plaintiff's case, your Honor.

The Court: The record will show that the plaintiff, having introduced the exhibits designated 1, 2, and 3, and the stipulation of counsel, rests its case.

Mr. Garroway: May we have the indulgence of the Court, if your Honor please?

The Court: Yes, you may.

Mr. Garroway: We would like to have about ten minutes, may it please the Court. May we have that?

The Court: Yes. The court will be in recess then until 10:40 A.M.

10:40 A.M.

The Court: You may proceed for the defendant, gentlemen.

Mr. Garroway: If the Court please, the defendant rests.

The Court: The record will show that the defendant rests without offer of proof. Do you desire to make any comment or argument to the Court?

Mr. Johnson: Just a few comments, if your Honor please. [52] If your Honor will notice, Paragraph 4 of the agreement is the one in which we are basically interested. Paragraph 4 provides for the payment to the plaintiff by the defendant the sum of five hundred or six hundred dollars per month. It then goes on and states that, however, if the defendant's income drops below a certain amount, that these amounts may be changed. However, the original agreement, the agreement which is definite, the one which the defendant is obligated to pay, is the five or six hundred dollars per month. The five hundred dollars per month, I think, was so long as

the defendant remained married to his first wife, or so long as she was not obligated to pay income tax. Upon divorce, I believe the law is that the wife becomes obligated to pay tax on those amounts paid to her by the husband, which is six hundred dollars per month.

The Court: Now, counsel, the Court has spent some little time in looking over the agreement and Paragraph 4, at first blush, is just a little bit confusing. The Court has summarized the paragraph in this manner—I am going to read it:

"The husband promises and agrees to pay to the wife for her own support and maintenance the sum of Five Hundred ($500) Dollars per month on the fifth day of each and every month commencing as of the fifth day of June, 1949, and continuing during their joint lives as long as she remains unmarried to another, but the obligation of the husband to make such payments shall [53] terminate as of the date of the wife's death or marriage to another, and shall also terminate upon the husband's death, without any liability on the part of his estate or personal representative, to make such payment after his death. Whenever the wife becomes obligated to pay an income tax thereon and the husband becomes entitled to an income tax deduction therefor, the said payment of Five Hundred ($500) Dollars per month shall be increased to Six Hundred ($600) Dollars per month and shall continue at the rate of Six Hundred ($600) Dollars during any period that the wife is required to pay an income tax

thereon and the husband is entitled to an income tax deduction therefor. However, if and when the husband's annual 'net income' (meaning by that phrase his gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income tax payments by him for that year) is less than Seventeen Thousand Five Hundred ($17,500) Dollars in any calendar year, the monthly payments to the wife for the succeeding calendar year shall be that proportion of Five Hundred ($500) Dollars or Six Hundred ($600) Dollars (whichever amount is then applicable) that Seventeen Thousand Five Hundred ($17,500) Dollars bears to the husband's annual 'net income' during said [54] immediately preceding calendar year in which his 'net income' is less than Seventeen Thousand Five Hundred ($17,500) Dollars, but the minimum payment shall be Three Hundred ($300) Dollars per month as long as the husband's annual 'net income' equals or exceeds Seven Thousand Two Hundred ($7,200) Dollars per calendar year, and whenever the husband's annual 'net income' equals or exceeds Seventeen Thousand Five Hundred ($17,500) Dollars in any calendar year, the monthly payments to the wife for that year and each and every succeeding year in which the husband's annual 'net income' equals or exceeds Seventeen Thousand Five Hundred ($17,500) Dollars shall be Five Hundred ($500) Dollars or Six Hundred ($600) Dollars per month (whichever amount is then applicable according to the above provisions in relation to income taxes thereon) on the fifth day of each and

every month commencing as of the fifth day of January of each of the years involved. If by reason of ill health, or any other cause, the husband's annual 'net income' should be less than Seven Thousand Two Hundred ($7,200) Dollars per year, the rate of monthly payments by the husband to the wife shall be one-half of his annual 'net income', except that if that event occurs at any time during the time the husband is obligated for [55] the support, maintenance and education of their two minor children, or either of them, as hereinafter provided in paragraphs 5 and 6 of this agreement, the payments *be* the husband to the wife shall be reduced to one-third of his annual 'net income' during the period of time that he is so obligated for the support, maintenance and education of their said children or either of them. Whenever the husband's annual 'net income' is less than Seventeen Thousand Five Hundred ($17,500) Dollars in any calendar year or less than Seven Thousand Two Hundred ($7,200) Dollars in any calendar year, the husband shall furnish the wife, her agent or attorney, an itemized statement of his annual 'net income' and shall permit the wife, her agent or attorney, to make a detailed examination and audit of his books and record and income tax returns for the calendar years involved for the purpose of determining the accuracy of the itemized statement furnished by the husband to the wife, her agent or attorney. The wife agrees to sign a joint income tax return with the husband, at his request, until such time as she is required to make a separate

return and pay a separate income tax on the money paid by the husband to her."

It appears that the first sum mentioned as net income is Seventeen Thousand Five Hundred Dollars, and the first provision is: [56] "However, if and when the husband's annual 'net income' * * * is less than Seventeen Thousand Five Hundred ($17,500) Dollars in any calendar year, the monthly payments to the wife for the succeeding calendar year shall be that proportion of Five Hundred ($500) Dollars or Six Hundred ($600) Dollars (whichever amount is then applicable) that Seventeen Thousand Five Hundred ($17,500) Dollars bears to the husband's annual 'net income' during said immediately preceding calendar year in which his 'net income' is less than Seventeen Thousand Five Hundred ($17,500) Dollars * * *", and this apparently is the basis which you refer to, that so long as the defendant's net income is $17,500 or better, the wife is to receive $500 per month, which amount is to be increased to $600 per month, in the event the wife is required to pay income tax and the husband is given credit for the amount that he pays to the wife. There are two conditions that must occur before it increases to $600.

The next income bracket is $7200 to $17,499; in other words, just below $17,500. In the event the husband's, or defendant's net income falls within that range, then the payment is to be made on a pro rata basis. If the total income of the defendant is less than $7200, the plaintiff is to receive one-half of that net income, provided that in the event

the income is less than $7200 and the defendant is required to make government contributions, the plaintiff then is to get one-third rather than one-half. Now this just about gives the formula. [57]

Mr. Johnson: Your Honor, one thing I would like to call to the Court's attention is the first part of Paragraph 4. The basic obligation at the time the contract was drafted was five hundred dollars or six hundred dollars to be paid. Then in the event, even at a later date, his income was to drop, my point is in determination of what his income is, the burden is upon the defendant to show it and not upon the plaintiff. Number one, basically the husband is to pay the wife between five hundred and six hundred dollars. Then, however, if his income is to fall below $17,500, which are facts arbitrarily within his own knowledge, then in that event it is adjusted downward. I am speaking more or less on the point of burden of proof relative to that matter. Does your Honor follow my thinking in that matter?

The Court: Yes.

Mr. Johnson: Have you read the first portion of Paragraph 4, or would you like to have me read it to your Honor?

The Court: As a matter of fact, I have read it many times.

Mr. Johnson: I thought you probably had. Therefore, we feel that the way the contract is written, the way it reads, the intention of the parties when they executed it was that the defendant would be obligated in the sum of five hundred dollars until he divorced her, at which time, as a mat-

ter of law, she would become liable for income tax on whatever he paid her, and he [58] would be entitled to deduction. At that time he would pay her six hundred dollars. Subsequent to that, if his income were to drop, it would be within him to prove or to give the Court evidence of the fact that his income had dropped.

It also defines net income in the agreement, as to what it was intended at the time that the agreement was made. That is another point that I would like at this point to make. It was consummated in the District of Columbia. It was consummated prior to the defendant's ever coming to the State of Nevada, and it was consummated with the intent that his income from his medical practice would be subject to the definition of net earnings as set out in this contract. He had never at that time heard of community property, nor did he hear of it until some time later, and we have much authority to the effect that a contract must be performed in accordance with the law of the place where it is executed and in accordance with the intention of the parties at the time of the execution.

Therefore, that point, No. 1, it must be interpreted by this Court in accordance with the laws of the locus of the contract.

Number 2, this contract, and the interpretation of it, has already been considered by another court of competent jurisdiction in the State of Virginia. The time for appeal has passed; no appeal has been made. The defendant in this case has had his day in court and he has had the opportunity to raise all

[59] of the points relative to community property which he now raises, which by reading of what has been introduced in evidence, was not at that time raised. It would seem to me illegal that any person or any corporation could change the meaning or intent of a contract merely by moving his place of residence. I do not believe that is the theory of the law. I do not believe it is the spirit of the law.

The Court: The Court agrees with you to that extent.

Mr. Johnson: And I also believe that the Virginia judgment, as to interpreting the contract therefore relative to that, definitely is res adjudicata.

I might also state, if the Court will examine Exhibit 3 introduced by the plaintiff, the Court will find that the Virginia court assessed certain expenses of the education of Betsy Gene Greear at Duke University School of Nursing to the defendant, which have not been paid. The defendant now comes into court and claims he disapproved of that school. My theory on that is that that matter has been decided, it is res adjudicata, and he can not come in, in another court and raise a defense which is different, if it is. Now I do not know what his defense was there, but the Court found that Mrs. Greear, the first Mrs. Greear, was entitled to the expenses relative to that amount.

There is one other point I should like to raise. In the contract, the 1955 directive order No. 715, of the $1106, your Honor, is an allowance that goes outright to the girl, whether or [60] not she goes

into school. The balance of the sum of four hundred dollars are payments for tuition and expenses, which we feel the defendant should pay. Now prior to this hearing she was attending the school to which he claims he objected and Mrs. Greear was awarded expenses relative to sending their daughter to that school. Now since November 1, 1950, with the exception of $1125, that is approximately six years, the defendant has paid nothing.

Mr. Bartlett: Just a moment—as I understand now——

Mr. Johnson: That is in the pre-trial, it is stipulated, that the full amount paid the plaintiff to date has been $1125; it is in the pre-trial order. It has already been decided. That is my understanding.

The Court: That is the Court's understanding. A certain amount of money has been paid.

Mr. Bartlett: That is correct, your Honor.

Mr. Johnson: Nothing more has been paid since November, 1950.

Mr. Bartlett: Counsel is testifying as to the school which the daughter attended, which she had no right to attend. That is what I am objecting to.

Mr. Johnson: If the Court please, there is evidence, if the Court will read plaintiff's Exhibit 3, relative to the school Betty Gene Greear attended at that time.

The Court: As to your statement that the burden is [61] on the defendant to carry to the plaintiff the information that his net earnings have fallen below the amount of $17,500, I observe that Paragraph 4 has a provision relative to that, which

reads—I have a copy of the contract of 1949, which is attached to the complaint — this provision is on page 6 and it is the first full sentence at the top of that page:

"Whenever the husband's annual net income is less than $17,500 in any calendar year or less than $7200 in any calendar year * * *"

I am unable to see that that last figure, $7200, that would add anything to it. What it means, when the defendant's income is less than $17,500 he shall furnish to the wife the itemized statement of his annual net income and shall permit her to make an audit of the books of the defendant. Is that the condition you had in mind when you say it is the burden of the defendant to make knowledge of his changed financial status to the plaintiff?

Mr. Johnson: Yes that is, your Honor, I understand that to be so. Whether or not that has been submitted each year, frankly I do not know. If the Court please, I prepared a brief outline of the argument.

The Court: Do you wish to outline the argument?

Mr. Johnson: I believe I have in most instances, your Honor, with the exception of the one thing, definition relative [62] to income. The net income is defined as the husband's income less ordinary and reasonable office expenses and income tax payments. There has been some argument as to what are usual, ordinary and reasonable office expenses.

The Virginia court, of course, has made a determination relative to that.

The Court: Do you wish to have published the deposition of James N. Greear and filed?

Mr. Johnson: Yes, your Honor, I would like to have it published.

The Court: If the deposition were to be received in the orderly manner, it should have been before the plaintiff rested, but one purpose of permitting it to be published in the plaintiff's case will be to permit the plaintiff's case to be reopened. It is the order of the Court that the deposition of James N. Greear, dated October 1, 1956, be, and it is hereby, published and filed.

Mr. Bartlett: May the record further show that the defendant, since the plaintiff's case in chief has been reopened, the defendant has the right to proceed.

The Court: That is proper and the record will show, as Mr. Bartlett has said, defendant is given the right to reopen his case in chief, and in the light of the deposition, we will proceed with anything you have to offer. [63]

Mr. Garroway: Do I correctly understand that the statements on admission made in defendant's trial memorandum are already then before the record? In other words, with respect to the net income for 1952, 1953, 1954 and 1955, the defendant filed memorandum setting forth amounts he deems to be net income for those years, subject, of course, to the Court's determination as to whether or not that is community property and community net income,

but it has been my understanding that such admission in the trial memorandum places it as an admission in the record. If that is not correct, then I want to offer it in evidence.

Mr. Johnson: If the Court please, I will object to those particular figures as to what constitutes net income at that time, under the definition as contained in the agreement.

Mr. Garroway: Well, now, if the Court please, at the pre-trial we discussed the possibility and probability of counsel for the plaintiff employing a certified public accountant and we then and there offered all the books and records of the defendant to that certified public accountant and Semenza & Kottinger of Reno have been, as I understand, employed by the plaintiff and they have had access to all books and records of Dr. Greear and they have submitted a report, a copy of which Mr. Johnson was kind enough to give us, and I have that report here and the figures which are now in our trial memorandum as admitted net income are the exact figures shown by Semenza & [64] Kottinger in that report, and I am speaking now with respect to Mr. Johnson's argument that the burden is upon us to show our net income is less than $17,500. I don't agree, of course, with that conclusion. I feel there is a burden upon the plaintiff too, but if there is such a burden upon us, then that is evidence which I offer and I am taking the evidence from the report of the certified public accountant employed in this case by the plaintiff.

Mr. Johnson: If the Court please, it is true we

had that done and I have a copy for the Court, if the Court so desires. However, we do not feel, counsel for the plaintiff do not feel, that Mr. Semenza is qualified to construe the contract in this case and for the purposes of finding gross income and expenses, whether or not they were considered to be usual, ordinary and reasonable office expenses. As to income taxes, there is no argument, but there is some argument relative to the others. I am perfectly willing with counsel to stipulate—I don't have the original, only a copy.

Mr. Garroway: I have only my copy.

Mr. Johnson: I have two copies, but I do not have the original.

Mr. Garroway: If the Court please, it seems to me, from what Mr. Johnson has said, we will now get into the matter of the determination by the Court of all items of deduction which are claimed in arriving at the figures which we have admitted [65] to be the net income for the respective years. In other words, it has been my thought, and apparently incorrectly so, that plaintiff was employing a certified public accountant as one who was expert enough to know what items were properly deducted against gross income and therefore ascertain, for the benefit of this Court, what would be net income from the operation of defendant's professional business. If that is not now admitted by the plaintiff, we will present every item of deduction and counsel can object, but the Court would have to decide which items are or are not deductible, in order to arrive at net income under the terms of this agree-

ment. It had been my thought at the pre-trial that perhaps Semenza & Kottinger could come forward with a report which would be acceptable to both sides and we have accepted it and we call attention to the fact that the agreement itself provides for an acceptable certified accountant going to all the books and records of the defendant, and that is what we have afforded to the plaintiff and it is the plaintiff's certified public accountant who has made the report and given the figures and we now submit to the Court comprises the net income of that business.

Mr. Johnson: In my trial memorandum, if the Court please, I did state at the time of the trial this report would be given to the Court for whatever it was worth.

The Court: Of course, if counsel will stipulate the Court will have the report for what it is worth, [66] then we will admit it. As a matter of fact, the Court would have to necessarily allude to the deposition, because up until that time we had the matter pretty well tied up.

Mr. Garroway: I am sorry—I can't quite understand the last remark of the Court, that there is nothing before the Court in this respect. Is it true then that the admission in the trial brief we have filed has not been a matter of evidence? My thought on it was that the figures that are in that brief are an admission that is net income from the business.

The Court: I will say to the extent of the figures, it would be admission of at least that much, but I do not see where the Court is circumscribed

that it can't consider that it wasn't all the income.

Mr. Garroway: Then I assume, from the recent ruling of the Court, we would have permission to put Dr. Greear upon the stand and have him answer several questions with respect thereto.

The Court: If you wish to put on any proof, certainly the Court will be pleased to hear it. It is the Court's desire to have this matter for the record. I merely stated in the beginning what appeared to be the understanding at the pre-trial.

Mr. Bartlett: Do I understand counsel is offering the Semenza & Kottinger matter and report in evidence and asking if we have any objection? [67]

Mr. Johnson: If we do, we would offer to change figures of gross income, your Honor. There might be some argument relative to what constituted office expenses.

Mr. Bartlett: Do you desire to offer what you think may aid you and refrain from offering what you think is not going to aid you?

The Court: If it is admitted, it will go in for all purposes.

Mr. Bartlett: We will stipulate to the admission. These are prepared from the books of Semenza & Kottinger, at the request of the plaintiff. We are willing to stipulate that that entire report go into evidence.

Mr. Hilland: Your Honor please, what we can stipulate with respect to that report is this: that the figures in it are correct, both with respect to gross income and deductions. What we can not stipulate is that the accountants who made that report are

the judges of the meaning of net income as defined in this contract. In other words, if it is admitted with the understanding that your Honor will determine what are usual, ordinary and reasonable office expenses, within the meaning of the definition of net income in the contract, then we can stipulate to it. That would mean that what your Honor would have to do would be to find out from the testimony of Dr. Greear what constituted usual and ordinary office expenses at the time this contract was made in 1949, and then determine whether or not all [68] of these deductions he has claimed fall within those categories, namely, usual, ordinary and reasonable office expenses. Now actually he has claimed a lot of things in there for deductions which we think, under a correct interpretation of the contract, and particularly the definition of net income in the contract, they would not be allowable deductions. We have asked Mr. Semenza to restate his report on that basis, so that your Honor probably would not have to do the arithmetics. We have asked him to do that, but we certainly would have to take some testimony to determine what were usual and ordinary and reasonable expenses at the time of the contract, because a lot of these things are not in that category.

The Court: You would stipulate the correctness of the figures, as far as they go and are shown by the exhibit?

Mr. Hilland: Yes, your Honor.

The Court: Certainly the Court is going to have, as its evidence to determine the matters that it

must apply its reasoning on, a firm of accountants and I can say that the accountants' breakdown in one category or another is not binding on the Court. It is a piece of evidence that the Court will consider.

Mr. Hilland: With that understanding, we will stipulate.

Mr. Garroway: I would like, if possible, to know now [69] what categories are set forth in this report that plaintiff's counsel will admit are properly deducted and which categories they claim are not. Then I also want to know whether or not in this proposed new statement of Semenza & Kottinger, will this same list of categories be followed, or will there be a change?

Mr. Hilland: I call your Honor's attention to the wording of that definition of net income. The contract set that meaning by that phrase, "the usual, ordinary and necessary office expenses" and income tax payments made by the defendant for that year. Now under that definition, in this statement he has a heading of "Dues and Memberships", which we contend do not fall within the category of office expenses.

Mr. Garroway: Dues and Membership?

Mr. Hilland: Yes. Immediately after that is the heading of "Entertainment", which we contend does not fall within that definition. Next heading immediately after that is "Medical Meetings, Direct Expenses" under one, and second "Arbitrary Allocation." We contend that medical meetings are not within the definition of net income or expenses

allowable deductions, and at that point, your Honor, I am going to have, inasmuch as we have not reached a definite stipulation yet—I am going to have to reneg. This expense on "Medical Meetings, Direct Expenses", we do not accept those figures. "Arbitrarily Allocated", we could not accept the figures opposite that heading. The next heading here we contend, the next items under allowable deductions, is [70] "Medical Journals" and "Professional Insurance," "Interest," "Auto Expense," and "Depreciation."

Mr. Garroway: Now am I to understand that the new figures or statement to be prepared by Mr. Semenza will follow the same categories?

Mr. Hilland: Yes sir. In other words, the new statement will omit the categories which I indicated.

Mr. Garroway: That new statement, then, will contain all the figures upon this statement, except such as apply to the categories which you are objecting to?

Mr. Hilland: That is right.

The Court: Wouldn't a little addition and subtraction make this statement work?

Mr. Hilland: Yes, your Honor, but there are a powerful lot of figures in there. Unless you like figures better than I do, you are not going to want to do that.

The Court: I know. As I understand this discussion which has been directed toward the statement, which I understand was made by Semenza & Kottinger, that both counsel for the plaintiff and

defendant are agreed, as I understand it, that the figures are proper, they are correct, and to that extent there is no objection to it being in evidence?

Mr. Hilland: With that one exception I stated, that I said to your Honor I would have to reneg on, that is "Arbitrarily [71] Allocated," figures under heading of "Medical Expenses."

The Court: I hadn't completed my statement. Plaintiff's counsel say that the report should be taken for what it is worth. The plaintiff proposes to offer another statement, based on the same figures, but showing only, indicating, what are proper expenses. Now it would appear to me that both the present set of figures and the new set of figures which will be made, at best they are going to be on figures which you consider are true, and this present one shows the theory of office deductions which the defendant deems proper, and the next will show a set of figures that the plaintiff considers are proper.

Mr. Hilland: That is satisfactory.

Mr. Bartlett: My only thought was, I should think it might be helpful to the Court if the accountant who prepared this, and is after all the accountant for the plaintiff, were to testify as to expenses, whether or not the purchasing of medical journals, to which they object——

The Court: Now it is true he may testify to the breakdown and it may be of some assistance to the Court, but after all the Court can't help but take judicial notice of its experience over some thirty years of conducting an office, and certainly the

Court will be more influenced by that knowledge and experience [72] than it would be by any particular views of the accountant.

Mr. Bartlett: I might state also, in case this has not been verified for the record, that Mr. Johnson said he didn't know whether or not these forms, income tax returns, had been furnished to the plaintiff prior to this time, and they have been, they have been furnished with copies of all income tax returns for several years.

The Court: Let us not get away from these statements, gentlemen.

Mr. Garroway: If the Court please, we are just a little bit uncertain as to the procedure now. Would it be satisfactory to the Court——

The Court: The case will be reopened.

Mr. Garroway: Then would it be satisfactory to the Court to put Dr. Greear on now with respect to these items?

The Court: Yes.

Mr. Hilland: Do I understand correctly that Mr. Semenza's other statement will also be submitted, his restatement of this, or admitted when it is brought in?

The Court: That is the Court's understanding. Let the record show that, pursuant to stipulation, the case is reopened for the taking of testimony, that the statement of Semenza & Kottinger, made February 27, 1957, is received in evidence as plaintiff's Exhibit [73] 4, with the understanding that a further statement will be made by the same firm, based upon the same gross figures, but showing the

breakdown on the basis of plaintiff's theory of office expense deduction, and at such time as that is prepared, a copy served on counsel for the defendant and copy filed in Court, will be admitted in evidence as Plaintiff's Exhibit 5.

[See pages 128-136.]

Mr. Bartlett: Yes, your Honor. Now I assume on that subject we are not going to be confronted with the opinion statements of Semenza & Kottinger. As I understand, they are simply going to break down to follow the theory advanced by the plaintiff.

The Court: That is my understanding.

Mr. Hilland: That is right. I think it should be understood all the way through to any extent their opinion may be reflected in the statement, it is to be disregarded by the Court.

The Court: Gentlemen, in keeping with the statement the Court has made, it does not propose that the opinions of Semenza & Kottinger will be taken or considered by the Court.

Now do you desire to put on Dr. Greear? [74]

DR. JAMES N. GREEAR, JR.

being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Garroway): Dr. Greear, you are the defendant in this case? A. I am.

Q. Some time during the last six months or so have you furnished to Messrs. Semenza & Kottinger all of your books and records in connection with

(Testimony of Dr. James N. Greear, Jr.)
the operation of your office and business as a medical doctor and eye specialist? A. I have.

Q. Did you make available to them all the books and records you have? A. Yes.

Q. Did they ask for anything they did not receive from you?

A. There were some things that I inadvertently —bank statements—that I inadvertently left out of the offer he first took, which were later, when he called my office, found and turned over to them.

Q. I show you what has been marked Plaintiff's Exhibit 4, and I call your attention to the item on the statement of figures, "Dues and Memberships." Will you explain generally those items that go to make up dues and memberships, as to the figures shown on this statement of Mr. Semenza's?

A. Dues and memberships applies to dues as to medical societies.

Q. What medical societies do you belong to, to which you pay [75] dues?

A. I belong to the American Medical Association, American Ophthalmology Society, American Academy of Ophthalmology and Otolaryngology, the Virginia Medical Society, the Medical Society of the District of Columbia, Society of Medical Consultants, World War II, the Nevada State Medical Association, Reno Surgical Society, San Francisco Ophthalmology Round Table, American College of Surgeons.

Q. That is what you can remember now?

(Testimony of Dr. James N. Greear, Jr.)

A. Pacific Coast Optology Society. Those are generally the ones I am actively engaged in.

Q. And are those the memberships that required you, in the years 1952 to 1955 inclusive, shown on Exhibit 4, to pay dues and membership dues that are shown on that statement?

A. That is correct.

Q. I call your attention to the next item on the statement, "Entertainment," which shows for the year 1955 only $720 net expenditures. Will you explain what that is for, Doctor?

A. Well, doctors, as well as lawyers I am sure, can't advertise through papers or ordinary media of advertising, but they can entertain people who are patients of theirs, doctors who refer patients to them, and that sort of thing; simply a means of expressing your appreciation for the confidence that other doctors have placed in you, and that is one of the things that is considered, is accepted, by the Internal Revenue as an allowable [76] deduction in the operation of a practice of medicine.

Q. Doctor, what is your specialty?

A. I specialize in diseases of the eye.

Q. From what sources do you get your business?

A. Primarily you get your practice from referring physicians, a great percentage.

Q. Where is your office?

A. 100 West Center Street.

Q. Do you know how much square foot space you have there, that is, say something about the size of your office, your equipment.

(Testimony of Dr. James N. Greear, Jr.)

A. My office occupies three rooms. They are good size; actually five rooms, at the moment. They are all pretty good size. I might say they are probably 15 by 18, that is two of them, three of them 15 x 20; and expensive equipment, instruments that are used in the examination of eyes, and the cost of these things——

Q. With reference to the item of entertainment, will you tell us principally who are the recipients of that entertainment?

A. Primarily physicians.

Q. I call your attention now to the item on this statement, "Medical Journals," which has a sum expended each of those years of 1952 to 1955 inclusive. Will you tell us what journals were purchased?

A. I took the Journal of American Medical Association, the Journal of American Medicine, the American Journal of Ophthalmology, [77] books and periodicals, books that are being published continually, we purchase those.

Q. Do you consider all those necessary in your profession? A. They certainly are.

Q. I call your attention also to the items under the heading of "Professional Insurance" for each of the years mentioned. Will you tell us what that expenditure was for?

A. That is for insurance for suit for damages that a patient might incur at your hands.

Q. And what is the purpose of that insurance?

A. The purpose of that insurance is simply to

(Testimony of Dr. James N. Greear, Jr.)
protect the physician who might be sued by some person.

Q. What does the insurer of that insurance policy agree to do for you?

A. He agrees to defend me in case of suit, malpractice, treatment patients receive at your hands.

Q. And will the insurance company pay any judgment that might be entered against you to save you from paying? A. That is right.

Q. I call your attention to the items under the heading of "Interest" on this statement and ask you what that was for?

A. "Interest"—when I established my practice in the State of Nevada I had to borrow considerable sum of money to equip my office and I discussed this with Mr. Semenza and explained to him a portion of that interest I felt was deductible because it [78] was money I borrowed to equip my office.

Q. Did you have a discussion with Mr. Semenza concerning the items which are appearing on this statement? A. Yes, I did.

Q. And from that discussion is it your thought, and from what you know of the figures, that the items of interest shown on this statement represent solely interest paid on obligations incurred in connection with equipment and the operation of your office?

Mr. Hilland: We object, your Honor, on the ground Mr. Semenza was not employed to enter into any understanding with Dr. Greear concerning

(Testimony of Dr. James N. Greear, Jr.)
what was properly allowable deduction, and that is something for your Honor to decide.

The Court: You may restate the question.

Q. Dr. Greear, you have said that you discussed with Mr. Semenza the various figures that are shown on this report of Mr. Semenza's. Because of that discussion, and because of your knowledge of your own books and figures, do you say that the items which are now shown on this statement, Exhibit 4, as having been expended for interest, cover solely interest on obligations incurred by you in connection with the purchase of equipment and the operation of your professional office?

A. I would assume that these figures represent the interest on money that was borrowed to equip my office when I first began practice in Nevada, and pursuant to the discussions that I had [79] with Mr. Semenza relative to it.

Mr. Hilland: We object to that and move to strike because he said that is his assumption.

The Court: The answer will be stricken. Your answer is not entirely responsive, Doctor. I do not wish to lead, but what I am interested in, are these figures based upon your own knowledge of the facts?

A. These figures are, yes.

Q. I call your attention now to the category of this statement, Exhibit 4, "Auto Expenses," and the various amounts shown for each of the years in question. Will you tell us what that represents?

A. That represents eighty per cent of the cost

(Testimony of Dr. James N. Greear, Jr.)
of operation of my automobile and twenty per cent for personal use of the car.

Q. Doctor Greear, how much of the entire use of your automobile do you attribute to your professional use? A. At least eighty per cent.

Q. And this figure, as you have said, is eighty per cent of the total upkeep and expense of the automobile? A. That is correct.

Q. I call your attention to the item of depreciation, showing certain figures for each of the years in question. Will you explain that to the Court please?

A. That is simply the normal depreciation on the automobile, which is allowable by the income tax, Internal Revenue, on income [80] tax returns, and it is a depreciation on my automobile that I use in my practice.

Q. Is there any depreciation on equipment in that figure?

A. Equipment of the automobile?

Q. No, equipment in your office?

A. I am sure there is. There is some equipment. Those are the only two items that could be included in depreciation.

Q. I call your attention now, Doctor, to the several items under the category, "Medical Meetings," entitled "Arbitrarily Allocated," and various amounts shown there for the years in question. Will you explain that please?

A. Yes. In connection with medical meetings, I

(Testimony of Dr. James N. Greear, Jr.)
have discussed this with the Internal Revenue people and they have——

Mr. Hilland: We object to that and move to strike that.

The Court: For the moment the Court will overrule the objection.

A. Simply I went to them and asked them what I might deduct from my income tax in regard to the expenses of medical meetings and they agreed that a certain figure would be allowable, and that is what this "Arbitrarily Allocated" is.

The Court: In short, you didn't have an itemized account of what your daily expense was?

A. That is right.

The Court: But so far as you could, you estimated and discussed whether or not that was a proper deduction [81] with the income tax people and these figures represent the amounts properly deducted?

A. That is correct.

The Court: The answer may stand.

Q. How long have you been engaged in your practice? A. Since 1923.

Q. Where did you first practice?

A. I first began actively in private practice in the District of Columbia.

Q. Did you practice there continuously until you came to Nevada?

A. Except during the period that I was in New York during World War II.

Q. Did you practice there alone or with others?

(Testimony of Dr. James N. Greear, Jr.)

A. I was engaged in practice with two other doctors, first one other physician and two and finally three of them at the time I left there.

Q. Did you have a partnership?

A. I had a partnership.

Q. When did you come to Nevada?

A. On the 5th of July, 1950.

Q. When did you commence to practice in Nevada?

A. I received my license to practice on the 7th of August and began to practice shortly after that.

Q. Have you practiced here continuously from then until now? A. Continuously. [82]

Q. Doctor, how many rooms did you have in your office in Washington in your partnership?

A. I have to think—we had eight.

Q. I now refer again to this statement of Semenza & Kottinger, Exhibit 4. I ask you if, in your practice in Washington, you had similar categories of expenditure? A. Yes sir.

Q. In your practice over the years, are you familiar with the operation of offices conducted by others in your profession? A. Yes sir.

Q. Are you familiar with those conducted in Washington, D. C.? A. Yes.

Q. Did you become at all familiar with any of them in Reno, Nevada? A. Yes sir.

Q. I ask you, Doctor, whether or not these items we have just been discussing in this report are normal and reasonable expenditures, as you know

(Testimony of Dr. James N. Greear, Jr.)

them, to have been incurred in offices of others engaged in your profession?

Mr. Hilland: Your Honor, we object to that on the ground it isn't a question of what others have done; it is a question of what is permissible under the language of Paragraph 4 of the contract of July 13, 1959. In other words, what constitutes office expenses within that term, not what somebody else does. [83]

The Court: Certainly the Court is interested in knowing whether they are reasonable.

Mr. Hilland: The question is not directed to the reasonableness now, your Honor, but the question is directed whether or not other offices, with which the Doctor has familiarity, makes deductions for similar expenses. That is the question. Undoubtedly other offices may have similar expenses, but the question is whether or not these expenses constitute office expenses.

The Court: Objection overruled. Read the question.

(Question read.)

A. The answer is yes and it is all the items that we normally have, the items that are commonly deductible and allowable on income tax returns as normal, usual and necessary office expenses.

The Court: The Court is not concerned with what usually is, Doctor. It is concerned only, are these all the type of usual expenses an office such as yours incur?

A. Yes.

(Testimony of Dr. James N. Greear, Jr.)

Q. Doctor Greear, would your answer be the same as of July 13, 1949, the date you entered into the agreement with Mary Schaaf Greear, that these are usual and ordinary office expenses and were such at the time you entered into that agreement?

A. They were. [84]

Q. Doctor, I refer you again to Exhibit 4 and call your attention to the items of net income as shown on the bottom of page 3 of that exhibit, showing figures of net income for the years 1952 to 1955 inclusive respectively. I ask you if those figures reflect the net income as shown by the books kept by you in the practice of medicine?

A. They do.

Q. Doctor, I call your attention again to Exhibit 4 and the item at the top of page 3, showing income, and I ask you whether or not you had any more income than the figures shown for those years, 1952 to 1955 inclusive? A. No.

Q. That is your gross income for each of those years? A. Each of those years.

Mr. Garroway: You may cross examine.

Cross Examination

Q. (By Mr. Hilland): Doctor Greear, when Plaintiff's Exhibit 1, which is the agreement of July 13, 1949, was entered into between you and the plaintiff, you were a member of a firm of medical doctors in the District of Columbia known as Drs. Burke, Greear and Downey, were you?

A. That is correct.

(Testimony of Dr. James N. Greear, Jr.)

Q. How many partners were there in that firm?

A. There were three partners.

Q. And they were you and Dr. Burke and Dr. Downey? [85]

A. That is right.

Q. How many doctors were there in the firm?

A. There were four.

Q. What was the name of the fourth one?

A. I forget.

Q. Dr. Haywood? A. That is right.

Q. How long had you been a member of that partnership? A. About twenty years.

Q. You began your association with Dr. Burke in 1923, I believe? A. That is correct.

Q. And then Dr. Downey and Dr. Haywood joined your firm some time after that?

A. That's right.

Q. The partnership paid the office expenses of the firm, did it not? A. No.

Mr. Garroway: I would just like to put on record this objection. The questions so far are relevant to the credibility of this witness as against his direct examination, but I would like it understood that admissibility of the evidence is for that purpose alone, to attack his credibility, rather than for the establishment of any condition which existed at that time. My general argument will be raised later, but I object in connection with other points involved in this case. [86]

Q. Dr. Greear, wasn't it the usual and customary

(Testimony of Dr. James N. Greear, Jr.)
practice in that firm for the partnership to pay the office expenses?

A. To pay the rent, light and head and stationery, the secretaries.

Q. How long had that been the custom of that particular firm?

A. The custom of that firm since I was associated with them.

Q. And periodically the profits of the firm were divided, were they not, among the doctors?

A. The profits were divided periodically.

Q. How often did that occur?

A. Monthly.

Q. Each one of you had a drawing account, did you not? A. No.

Q. Didn't each one of you have a drawing account under the articles of partnership?

A. No.

Mr. Garroway: Objected to, your Honor, as not cross examination.

The Court: Well, it goes a little far, but before the Court ruled it had been answered and the answer was no.

Q. Dr. Greear, isn't it a fact that out of the professional fees that the partnership took in, it paid the office expenses and then periodically you divided up the profits of the firm?

A. On a percentage basis. [87]

Q. Yes, on a percentage basis, and didn't you do that quarterly or semi-annually?

A. Monthly.

(Testimony of Dr. James N. Greear, Jr.)

Q. And do you have with you a copy of the articles of partnership that you had with Drs. Burke and Downey? A. No.

Mr. Garroway: I move the answer be stricken for the purpose of objection.

The Court: The answer is stricken. Objection sustained.

Q. Now, Dr. Greear, you remember testifying in this case at Warm Springs, Virginia, on June 8, 1953, in the case entitled, Mary Schaaff Greear vs. James N. Greear, Jr., civil case No. 73, in the Circuit Court of Bath County, Virginia?

Mr. Garroway: I would like to know the purpose of this examination.

Mr. Hilland: I am going to offer it for impeachment.

Mr. Garroway: In what respect?

Mr. Hilland: In respect to the answer he just gave.

Mr. Garroway: What is the answer you want to impeach?

Mr. Hilland: Let me get at it this way then.

Q. Dr. Greear, when you entered into this agreement with Mrs. Greear on July 13, 1949, which is marked Plaintiff's Exhibit 1, you had been operating under a medical partnership with Dr. Burke since 1923, had you not? Isn't that correct? [88]

Mr. Garroway: I object to that on the ground of irrelevancy. It seems to me it is not attacking his credibility with respect to the items of deduction

(Testimony of Dr. James N. Greear, Jr.)
which we have testified now on direct examination in connection with Exhibit 4.

The Court: I can't see where this particular line of questioning is very material or relevant, or how it can assist the Court.

Mr. Hilland: Here is what I want to show, your Honor. I want to show what was usual and ordinary expenses at that time.

The Court: I think you are entitled to do that, as to what the understanding was at that time, and to that extent you may proceed.

Q. Will you answer the question, Dr. Greear?

The Court: Restate the question.

Q. You were in a medical partnership from the time you began to practice in 1923, or shortly thereafter, until you came to Reno in 1950, were you not?

A. I was. Not immediately. I was on a percentage basis.

Q. You had never practiced medicine alone prior to coming to Reno, had you?

Mr. Bartlett: Objected to as immaterial.

The Court: It may stand. Objection overruled.

A. I practiced medicine alone all my life, ever since I practiced medicine. I was associated with other men, but I did my own practice. [89]

Q. But you had a partnership?

A. We had an office and partnership, yes.

Q. On July 13, 1949 the term "Office Expenses" had a definite meaning in your practice of your profession, did it not?

(Testimony of Dr. James N. Greear, Jr.)

Mr. Bartlett: We object to that as calling for conclusion of the witness on a matter which is going to have to be decided by the Court.

The Court: Objection overruled.

A. May I have the question?

(Question read.)

A. It had the same meaning as it has——

Q. Just answer yes or no. It did, did it not?

Mr. Garroway: The witness can explain.

Mr. Hilland: Yes, but the question now doesn't call for his explanation.

The Court: Answer the question.

A. Yes.

Q. Now the partnership to which you refer paid the office expenses, did it not?

A. The partnership paid the office expenses; it did not pay all the expenses, however.

Q. I didn't ask you that, Doctor. They paid the office expenses, did they not, the partnership paid the office expenses, did it not?

A. They paid the basic, some of the office expenses, but not all that was connected with the practice of medicine.

Q. I didn't ask you that. I am asking, did it pay the office [90] expenses connected with that partnership practice?

The Court: Answer yes or no and then explain, Doctor.

A. I have answered. They paid certain of the expenses, they paid certain of the expenses, yes.

Q. And all of those expenses which the partner-

(Testimony of Dr. James N. Greear, Jr.)
ship paid were office expenses, were they not?

A. They were a portion of the office expenses.

Q. Well, did the firm pay anything other than office expenses? A. The firm did not, no.

Q. In other words, everything the firm paid was office expenses?

A. What the firm paid are the expenses of running the office and each individual doctor paid any additional expenses connected with the practice of medicine.

Q. Yes. Now the net income of the partnership, after the partnership had paid the office expenses of the partnership, was divided among the partners on a percentage basis, was it not?

A. I think that is correct.

Q. And it was done in accordance with the agreement among the partners?

A. That is correct.

Q. On a percentage basis? A. Yes.

Q. Now the partnership filed an income tax return, did it not, every year with the United States?

A. That is right. [91]

Q. And with the District of Columbia?

A. That is right.

Q. And in that income tax return it showed and claimed deduction for those office expenses paid by it, did it not?

Mr. Garroway: Objected to as irrelevant. We are not concerned with what deductions for income tax purposes were.

The Court: I apprehend that counsel is perhaps

(Testimony of Dr. James N. Greear, Jr.)
getting into something more definite than that. Objection overruled.

Q. Will you answer the question, Doctor.

(Question read.)

A. It certainly did.

Q. And those returns show the distribution of the net income of the partnership to all partners in the firm, did it not? A. Yes.

Q. So the net amount which you received was after the office expenses had been paid by the partnership, is that correct?

A. After the office expenses?

Q. Yes.

A. That's right, to the extent that the partnership paid.

The Court: This witness has said other expenses were paid by them in their respective affairs of practice.

(Noon recess taken.)

1:30 p.m.

DR. GREEAR

resumed the witness stand on further [92]

Cross Examination

Q. (By Mr. Hilland): Dr. Greear, in July, 1949, when the agreement of July 13, 1949 was entered into, and prior to that month of that year and during years preceding the year of 1949, when you received your share of the profits of the partnership composed of Drs. Burke, Greear and Dow-

ney, did you pay your dues and membership fees in the medical societies? A. I did.

Q. And under those same facts and circumstances did you pay expenses of your professional entertainment? A. Yes.

Q. Did you, under the same facts and circumstances, pay the expenses of attending medical meetings? A. I did.

Q. Under the same facts and circumstances did you pay for the medical journals to which you subscribed? A. I did.

Q. Under the same facts and circumstances did you pay for the professional insurance that you bought for covering your professional liabilities?

A. I did.

Q. And did you pay the interest on monies you borrowed? A. I did.

Q. And did you pay the expense of operating your automobile, your personal automobile? [93]

A. I did.

Q. The partnership did not furnish an automobile?

A. It wasn't arranged in our partnership.

Q. And depreciation on your personal automobile was taken by you personally?

A. It was taken as part of my operating expense as a physician.

Q. Now going back to the dues and membership fees in professional societies in the year 1952, for which you claim allowance of $618. Did that include the Medical Society of Virginia?

(Testimony of Dr. James N. Greear, Jr.)

A. Medical Society of Virginia?

Q. Yes.

A. Yes, dues of medical societies, certainly.

Q. In what amount?

A. I couldn't tell you. I think probably seven dollars a year.

Q. And did it include the dues in the District of Columbia Medical Society? A. Yes.

Q. In what amount?

A. I couldn't answer that.

Q. You weren't practicing in Virginia in 1952, were you? A. I was not.

Q. What was the necessity for having membership in medical societies of those two jurisdictions?

A. The necessity for having those is very simple, in that my license to practice medicine in the State of Nevada is based upon [94] my having license to practice in the State of Virginia and the District of Columbia.

Q. Do you maintain membership in those two medical societies at the present time?

A. I do. It is obligatory.

Q Now your membership dues in those societies was $618, in all societies? A. Yes.

A. Six hundred eighteen dollars in 1952, $359.96 in 1955. Will you explain the difference?

A. I don't know the exact difference, but the only explanation I can give is there were probably assessments paid in medical societies, some of them, would make a difference in the amounts.

Q. And what was the reason for the difference

(Testimony of Dr. James N. Greear, Jr.)

between 1953, when the total amount was $428.50?

A. I can't answer that. I just stated that many of the societies set assessments in order to function, and that is the only explanation I can offer for the difference in the amounts in the different years.

Q. Under the heading of "Entertainment" you have claimed a deduction of $720 for the year 1955, is that correct? A. That is correct.

Q. That is the first time you ever claimed any deduction for entertainment, is it not?

A. I guess it is the first time. [95]

Q. You didn't claim any for 1952, 1953, or 1954, did you? A. I did not.

Q. And you never claimed any such item of deduction for any year prior to 1952, did you?

A. I never claimed it before I was advised that that was a proper deduction and the reason for it was that I didn't realize it was a deductible item in the expense of an office, and therefore had not claimed the deduction prior to 1955.

Q. Did you keep any record of your disbursements for entertainment purposes in 1955?

A. Not specifically, but I could, if occasion arises, produce evidence as to the actual expenditures of that amount of money.

Q. You kept no account covering entertainment?

A. Except for checks I have written for such entertainment.

Q. But your books and records you kept no account under the heading of entertainment?

Mr. Garroway: If the Court please, I would re-

(Testimony of Dr. James N. Greear, Jr.)
mark here that as I have understood the stipulation heretofore entered into, with respect to Exhibit 4, it is that the figures are correct and I think perhaps it is taking the Court's time, as well as the rest of us, to interrogate this witness now as to figures. I object on that ground.

Mr. Hilland: If I remember correctly, he went into it on direct examination. That is my best recollection.

Mr. Garroway: Not as to figures. There is just a [96] different recollection of mine.

The Court: He went into items, but not the figures.

Q. Let me ask him this question. That is an arbitrary figure, is it not?

A. No, that figure was based upon actual expenditures which I was able to determine from my check books and checks that were written in payment of items that were necessary in entertainment.

Q. Didn't you tell Mr. Semenza that it was an arbitrary figure of sixty dollars a month?

A. I have no recollection of that.

Q. Under the heading of "Medical Meetings" you have claimed two items, one for direct expenses, in the amount of $987.61, and one denominated "Arbitrarily Allocated," $630, for the year 1952, or a total of $1617.61 for that year. You have no record of the $630 item, do you?

A. The six hundred thirty dollar item?

Q. Yes.

A. It was a figure that was set, or discussed,

(Testimony of Dr. James N. Greear, Jr.)
with the Internal Revenue representatives, as being an allowable figure for hotels, meals, and things of that sort, incidental to a medical association meeting, amounted to a per diem, which they considered was allowable.

Q. If the $630 covers your hotels, meals, etc., what does the direct expenses of $987.61 cover? [97]

A. The direct expenses is primarily transportation.

Q. From where to where?

A. Well, I usually make anywhere from two to three trips attending medical meetings to Washington, to Chicago, New York, places that are remote from here, and the actual plane fare on those trips runs to something well over three hundred dollars for a round trip.

Q. On those trips you paid your hotel expenses and meals by check, did you not?

A. That is correct.

Q. And the hotel and meals were included in direct expense of $987.61? A. Not at all.

Q. Why do you call the $630 an arbitrarily allocated item?

A. I didn't call it that. It was called that by Mr. Semenza.

Q. And included in that item—who created the term "Direct Expenses"? A. Mr. Semenza.

Q. On your books, when you paid a hotel bill covering your room and meals at a medical meeting, you have a bookkeeping entry for that, do you not?

A. On my books?

(Testimony of Dr. James N. Greear, Jr.)

Q. Yes.

A. No. I have my cancelled checks.

Q. But you have a record of that in your office?

A. Yes, that's right.

Q. This $630 item, didn't you testify that that covered items concerning which you have no record?

A. Which I do have a record. Rather than keeping account of every penny I spend in attending these meetings or traveling to and from them, the Internal Revenue Bureau allows one to take an arbitrary figure that we consider is adequate to cover expenses and that is what this arbitrarily allocated item covers.

Q. Now you said you discussed that figure of $630 with a representative of the Internal Revenue. What was his name? A. I couldn't tell you.

Q. When did you discuss it with him?

A. I discussed that in 1949.

Q. And where did you discuss it with him.

A. In Washington.

Q. You never discussed this item of $630, this specific item, with him, did you?

A. I did not.

Q. And isn't it true that you never discussed any of the items under the years 1953, 1954, and 1955, denominated as arbitrarily allocated items?

A. I never discussed them with the Internal Revenue because I had already discussed it prior to then.

Q. And you can't give us the name of the agent with whom you discussed it? [99] A. No.

(Testimony of Dr. James N. Greear, Jr.)

Q. Nor the time or place?

A. I told you it was in Washington in 1948 or '49.

Q. And where was it in Washington that you discussed it? A. In my office.

Q. What was the occasion for that discussion?

A. I can't tell you. I don't remember what it was.

Q. Well, on these arbitrarily allocated items, did you not tell Mr. Semenza that those were items concerning which you had no records?

A. I have no recollection of telling him such.

Q. You claim total disbursements in 1955 for attending medical meetings of $3,683.53. Now how much of that $3,683.53 do you have any records?

A. Attending these medical meetings?

Q. Yes.

A. Oh, I probably have records of all of it, or essentially all of it.

Q. Now in that year you claim a deduction of $1327.50 for arbitrarily allocated expenses. Do you have any records covering that item of $1327.50?

A. I am sure that I have.

Q. Do you have any of those records with you?

A. I have not.

Q. You claim for the year 1954 for the same item of arbitrarily [100] allocated expenses, $1560. Have you any records with you covering that item?

A. I do not.

Mr. Garroway: Your Honor, I still think we are discussing figures and I object on that ground, be-

(Testimony of Dr. James N. Greear, Jr.)
cause the stipulation was to admit the statement and the only objection was as to the categories.

Mr. Hilland: On the arbitrarily allocated figures was the point I told your Honor I had to renege on.

The Court: I don't know why you reneged. This matter respecting these figures was accepted as true, so far as the figures are concerned. The only thing we are concerned with is the proper breakdown. That is the only question before the Court.

Mr. Hilland: I told your Honor, in the course of the discussion, those figures which I can not stipulate to were those under "Arbitrarily Allocated."

The Court: Let us strike the stipulation out that is in the record now, if you are telling me that your stipulation does not mean all that I understand it to mean.

Mr. Hilland: No, I am not telling the Court that at all. If the record shows, as your Honor indicates, that we stipulated to all these figures, I am willing to abide by it.

The Court: I asked you if the figures were stipulated [101] to and you said yes.

Mr. Hilland: If I remember, I asked the Court's permission to have the single right to object to that part of it.

The Court: We can have another stipulation.

Mr. Hilland: I think that will clarify the point I am making, that I did have that reservation in reference to figures, only that one.

The Court: If you have one reservation, then the

(Testimony of Dr. James N. Greear, Jr.)
stipulation does not stand. If in your use of the word "reneging" you mean you were holding something out, then I misunderstood you.

Mr. Hilland: That is what I said. I said I couldn't accept those figures. Those are the ones I am inquiring about now.

The Court: That might have been your intent, but you certainly didn't tell the Court that in so many words, because my clear impression is that these figures were taken as correct from data submitted by this witness to the accountant. The only information that we were concerned with was whether they had been allocated to the proper categories, and you were going to have a set made up to confirm that.

Mr. Hilland: Well, I will withdraw that question. I assume your Honor is sustaining the objection to that question.

The Court: No, counsel, it isn't this particular question. [102] This goes to the whole basis of this exhibit. I assume that the Court is going to be able to take this statement and the figures as correct, and the columns are correct. The only difference would be as to how the plaintiff set them up on one side and the defendant set them up on the other side. Now it appears that we are going into the very merits of the statement made by the accountants.

Mr. Hilland: Obviously there was a misunderstanding about these particular items. Needless to say, I can assure the Court that I certainly

(Testimony of Dr. James N. Greear, Jr.)
wouldn't inquire on that if I had intended to stipulate as to those particular figures.

The Court: Apparently, counsel, it was a misunderstanding. We might as well get the record made on it, so I think you had better state to the Court, Mr. Hilland, for the purpose of the record, what it is you propose to stipulate to, so we can see where we are going.

Mr. Hilland: What I told your Honor at the outset when I stood up was that we would not stipulate all of these figures, but I thought that your Honor was the judge of whether or not they are proper deductions and that we were not going to allow the accountant to decide the questions which should be decided by the Court and your Honor said of course if that was the case, you would not circumvent that. [103]

The Court: You properly interpreted the Court's comments.

Mr. Hilland: And then when I got into the figures, I told your Honor that there was one group of figures I would have to renege on and that was under "Arbitrarily Allocated" expenses for attending medical conventions.

The Court: Isn't it simple for you to set up in your columnization what you don't feel should be properly allowed as an expense and if you want to take the total sum of the travel expenses, you just show it?

Mr. Hilland: That's right.

The Court: In other words, we have the overall

(Testimony of Dr. James N. Greear, Jr.)
figures to a certain sum. The witness testified the accountant took from his figures and record he supplied. I frankly can't see why we should start breaking down like a tax evasion case. The case, so far as I am concerned, is to how these many items from the columnization, to make the information you desire, are pertinent to the Court.

Mr. Hilland: I will go to something else, then, your Honor.

Dr. Greear: Your Honor, during the lunch hour I refreshed my memory on the allocation of office of the partnership in Washington. It is over seven years now, this isn't very fresh in my mind, but each member of the firm, who was practicing under [104] this agreement, received so much money each month, he received a definite amount, and then twice a year the surplus over that was divided, depending on certain percentages, between the other members, and we paid all running expenses of this office. We didn't pretend to pay all the expenses incidental to the practice of medicine. We did, however, pay the immediate expenses connected with the office, and each man individually paid, out of his own amount he received from the office, his net income from the office, for medical meetings, medical dues, for his insurance, malpractice insurance, or upkeep of his automobile, for a great number of items which are incidental to the practice of medicine, and the reason for that was very simple, in that one doctor might attend a dozen meetings a year and another might attend one, so that we felt

(Testimony of Dr. James N. Greear, Jr.)
it was unfair for the fellow who only attended one meeting to contribute for expenses of the fellow who attended a dozen meetings. The same as to our automobiles, and so on.

The Court: I think the Court understands the import of your testimony, Doctor, and I realize that your testimony was just as you said, the partnership paid certain general expenses, the doctors making up the partnership bore other items of expense. Now as to the division of partnership earnings, I understand now that each doctor had a definite drawing amount each month which was, I suppose, computed to be within a safe margin of the total. Then at intervals [105] of some months apart, they divided up the surplus.

A. That is correct.

Q. That was done quarterly, was it not, Doctor?

A. I think it was done semi-annually. My recollection is not very clear on this, because it has been a long time ago.

Q. Doctor, Mr. Semenza's report shows the items in this statement, report for auto expenses and depreciation for the years 1953, 1954, and 1955 represent 100 per cent usage of Dr. Greear's automobile in his practice. This morning you said that those figures represented eighty per cent?

A. That is correct.

Q. You told Mr. Semenza that they represented one hundred per cent, did you not?

A. I did not.

Mr. Hilland: Your Honor, I don't know quite

(Testimony of Dr. James N. Greear, Jr.)
how we should handle that, in view of that—I presume he is bound by the report of one hundred per cent, but he did say on direct examination this morning it was eighty per cent.

Mr. Bartlett: That is correct, and counsel is asking many questions and I assume the questions are asked in good faith and the witness will be brought here to impeach, otherwise your questions are not asked in good faith when you ask the witness, did you tell so and so, so I can assume Mr. Semenza would be here concerning classifications; otherwise, we would object to questions along that line. [106]

Mr. Hilland: I am basing this on Mr. Semenza's report.

A. I have no recollection of telling Mr. Semenza that. I have an accountant make out my income tax return and he has discussed it with the Internal Revenue representatives and they agreed that was an adequate deduction, so far as expense of automobile was concerned.

Mr. Hilland: What I am trying to point out, your Honor, is their direct examination that impeached the stipulation, that if the testimony of this witness——

Mr. Bartlett: It didn't impeach the stipulation. The stipulation was the report could go in for whatever weight the Court would give it.

The Court: The understanding was whatever weight as to the various allocations, not true statement of fact as to the figures.

(Testimony of Dr. James N. Greear, Jr.)

Mr. Bartlett: Certainly I don't think there was any stipulation that any statements contained in the accompanying letter were true or untrue or in error or not in error.

Mr. Hilland: The whole of it was admitted.

Mr. Bartlett: Certainly.

Mr. Hilland: Certainly the statement is explanatory of the figures.

Q. Now, Dr. Greear, you said that eighty per cent is the amount the Internal Revenue representative told you was a fair apportionment to your professional use of the car. What Internal Revenue [107] agent told you that?

A. First, I didn't state as you asked the question.

Q. What did you say?

A. I stated that the accountant who made out my income tax return discussed this with the Internal Revenue agent and obtained from him the information that eighty per cent use of the cost of operating my automobile was a deductible item. I am sure it is, or more.

Mr. Hilland: That's all.

Mr. Garroway: That's all.

The Court: You may be excused, Doctor. Any further witnesses?

Mr. Bartlett: Your Honor, one question has come up and I will ask counsel to stipulate, so we might avoid taking further testimony.

I will ask counsel to stipulate that all of these earnings which are shown on Exhibit 4 in evidence

were the community earnings of Dr. Greear, the defendant, and his present wife. They were married June 15, 1951.

Mr. Hilland: I will go so far as to stipulate this —all of these earnings were professional earnings of Dr. Greear in Exhibit 4, subsequent to his marriage to the present Mrs. Greear in 1951. I believe the rest of the stipulation may well be considered conclusion of law, which I do not believe I should stipulate to. As to whether or not this is community property, [108] is a matter of argument.

Mr. Bartlett: Would you further stipulate that it was all earned while the Doctor and the present Mrs. Greear were living together in the State of Nevada and was earnings in the State of Nevada?

Mr. Johnson: Yes.

Mr. Bartlett: I think that is sufficient.

The Court: The stipulation is that the earnings referred to in Exhibit 4 were earned by the Doctor while married to his present wife, while engaged in practice in Nevada and both living in Nevada.

Mr. Bartlett: Your Honor, might I have the Court's indulgence a moment to examine this. There may be some separate income of Mrs. Greear.

The Court: Yes.

Mr. Bartlett: That is all.

The Court: You are referring to this last stipulation?

Mr. Bartlett: Yes, your Honor.

The Court: You have nothing further to offer. Let the record show that once again the defendant

rests. Gentlemen, I am still not happy about the stipulation on this Exhibit 4. I wonder if we could again have a stipulation on this, in view of the confusion that has been created as to what has been stipulated. [109]

Mr. Garroway: Of course, my comment on that at the moment is we have examined this witness and gone through the trial, and rested on the basis of the Court's understanding of the first stipulation. I would be loathe to withdraw my agreement to that stipulation as originally presented. I would be glad to do anything of assistance to the Court, but I am loathe to withdraw that stipulation, inasmuch as I acted under that stipulation ever since.

Mr. Hilland: May I ask the Court's indulgence?

The Court: Yes.

Mr. Johnson: May it please the Court, I have discussed with counsel—the stipulation presently is that Exhibit 4 will be admitted in evidence, that the figures contained therein, as explained, are correct, not arguing about what the figures state. If there is any argument, the argument will be as to whether or not they should be allocated as usual, ordinary, reasonable expenses of running of an office, under the definition contained in the contract, but the figures even as such, even those arbitrarily allocated upon the basis of thirty-five or forty-five dollars per day for the number of days claimed, according to the report, are correct.

The Court: That satisfied the Court, gentlemen. That, of course, applies also to prospective Exhibit No. 5, the same stipulation in relation to the cate-

gory of those figures is admitted by counsel for the defendant? [110]

Mr. Garroway: That is correct.

Mr. Johnson: We assume that those figures will be in main identical to these.

Mr. Garroway: Is this correct, that the new statement which will be submitted, Exhibit 5, will contain all items you have not objected as to categories and with the same figures as they now are on the present Exhibit 4?

Mr. Johnson: For gross income.

Mr. Garroway: And all your objected items will be allocated in toto from the new statement, Exhibit 5?

Mr. Johnson: That is correct, which means perhaps the figure for net income will be changed.

Mr. Hilland: There will be one other change in the figure, but it will be for the benefit of the defendant, your Honor. When he adjusts depreciation, as I understand it, he is going to take out of this statement only depreciation on Dr. Greear's automobile. He is going to leave in any depreciation allowances that is in those figures for his office equipment, other than his automobile and, of course, that is for the defendant's benefit, not ours.

The Court: Well, the Court is not very skilled as a certified public accountant, but it would appear that perhaps the very same figures that are now used in Exhibit 4 appear just in their present relationship [111] in Exhibit 5, but they are proper.

Now here is something that the Court is inter-

ested in. In connection with anything before the Court, like what you gentlemen think is owing or not owing to this plaintiff, I am going to tell you frankly I am not going to compute. I am not a bookkeeper, that is not my judicial function and in the pre-trial order this statement was made: "Since each party has a definite theory of how the payments should be computed, then it is a routine matter for each to prepare a chronological schedule of monies due from defendant under terms of the agreement, as he or she may interpret its provisions." Now the same thing can be done by the other side. The Court then takes that step by step and adjusts the items and arrives at its own conclusion, but do not be misled by that, that I am going to expert your bookkeeping, because I am not. Do you see what I mean, gentlemen?

Mr. Johnson: Yes.

Mr. Hilland: My thought on that, in discussing it with Mr. Johnson, was that the Court is confronted as of today with one additional proposition. You have concern with which of the items of expense are to be included, and then the Court must further determine whether this income, this is community income, and if it be community income, whether or not the present [112] Mrs. Greear is entitled to her one-half and whether income referred to in the agreement is then to be fixed only on the basis of Dr. Greear's one-half of the community. When those two questions are determined, then we will have the ability to figure out exactly what his income has been and then I think we could

submit on our sliding-scale basis, based on the agreement of what we feel is true.

The Court: As I see it, all this Court is concerned with is the contract. In other words, I am not going to make a problem ahead of time.

Mr. Bartlett: As I see it, there are two questions for the Court to determine—one is what expenses are going to be allowed in computing net income; the second is, when we get the net income figure, the Court must determine whether or not that is community income, and if it be community income, then under the agreement it would be our position that Dr. Greear's one-half of the community would be the income which would be referred to in this agreement, by which his monthly payments would be fixed. When the Court has determined those two questions, then we can apply them to the agreement.

The Court: That is all right, but I don't see where those particular things brings the Court to the point where it has to base on whether it is community or not. The agreement doesn't say community. The agreement says income. [113]

Mr. Bartlett: Yes, your Honor, but the agreement refers to net income of Dr. Greear.

The Court: Right.

Mr. Bartlett: Now if Mrs. Greear, the present Mrs. Greear, has an interest in the community earnings, she has half she can do with as she sees fit and the Doctor has half that he can do with as he sees fit, then it is our position that the income referred

to in this agreement would be Dr. Greear's one-half of the total community income.

The Court: I don't see it. Dr. Greear has an income before there is anything, and the fact that by his efforts he creates an income, then the law comes along and says, "Now we will take that income and make it community property in which Mrs. Greear is entitled to one-half." Now I am not saying what the Court is going to decide in this case, but I am thinking about what looks to be the rugged points of this case. If the Court should determine that this contract is to be construed with utter disregard of any community law, the Court has really construed nothing more than the contract and the judgment and attempted to construe it under the law. Then, on the basis of that, the plaintiff computes a certain amount of money due under the theory that the Court bases upon. Then the plaintiff will issue execution [114] and that is where it appears to me that your theory of community property, and the circumstances in relation to it, come into play for the first time, because then you have raised the question that if it be true the defendant, according to the ruling of the Court and construing of these particular accountants, whatever the figure might be, execution can only be issued against the separate property of the Doctor or against his proportionate share of the community. That is the question you have raised there.

Mr. Bartlett: Yes, I think the question has a two-fold aspect. In other words, making execution on what type of property can be divided and then

at that time the Court has to determine the nature of that property. But, your Honor, we think this is a very important point and I think I can illustrate by reverse situation. Suppose the present Mrs. Greear had signed an obligation, we will say, to pay so much a month and this suit were on that agreement and she is a housewife, as she now is, and the only income she has is her share of the community income, wouldn't the law be very strange and unfair one if she would then be totally freed, which would be the result, from any obligation to pay her one-half of the community funds in compliance with that agreement, simply because she didn't go out and work? Suppose Dr. Greear was not well and Mrs. Greear got a job and began to support him—community earnings, community income. Would that [115] then exonerate the Doctor from any obligation under this agreement?

The Court: Any argument as to concerning the applicability of community property to an indebtedness or liability, has nothing to do as to whether or not Dr. Greear is personally required to fulfill payments under a contract which he signed. Now whether or not the plaintiff, if the plaintiff should be fortunate enough to come with a judgment, whether the plaintiff can come against the separate property of the doctor, separate property of the wife, community property of both, is a matter to be determined at the time the plaintiff seeks to enforce judgment and get the money.

Mr. Bartlett: Then your Honor's interpretation

is that the agreement, of course, refers to his income?

The Court: Yes.

Mr. Bartlett: Your Honor's interpretation would then be if he were not employed but the present Mrs. Greear were employed and bringing in five thousand dollars a month to the community, that under the terms of this agreement he would then have no income, is that correct?

The Court: Well, I am presently not interpreting anything. I am saying that my job is to interpret the contract and the judgment. Those are facts which the Doctor himself is responsible for. He entered into the contract, no question about that. The judgment [116] confirms it. The only thing we are concerned with at the moment is what that contract means in relation to his earning power, his net income. Now you may argue community property says half of it goes to the community, then community has a bearing on what is his income, but as to who is responsible to pay any judgment, whether separate property or community, has nothing to do with the Court. If I am wrong, I want you to tell me.

Mr. Bartlett: That is correct, but my point is this, in interpreting the agreement, when it refers to his gross income, do you also include actual income of Mrs. Greear? Suppose she were employed?

The Court: We haven't any testimony before the Court that there was any income of Mrs. Greear's.

Mr. Bartlett: I think by reading the contract,

the phrase is earnings from the practice of his profession, and all it refers to there is his income. Now his income is one-half of whatever the community earns. I therefore think at this time your Honor must decide this question, as to whether or not the fact a husband is the one earning the community income means that this is all his income, or does it mean that one-half of it is his income?

The Court: Now you say by virtue of the income community property law, that the income of Dr. Greear is [117] only one-half of what he makes. What is the other half?

Mr. Bartlett: The other half belongs to Mrs. Greear.

The Court: All right, it belongs to him who earned it.

Mr. Bartlett: He earned it, but it is not his income. He doesn't pay taxes on it, she pays taxes on it.

The Court: The contract doesn't say that. What I am trying to put out to you is this—that as in every case, the Court has very little free choice. It is bound by the exhibits and the evidence and this case is very simple; first, a contract entered into between the doctor and his former wife. Now that can't be changed one iota. The only job the judge had to do on that is to determine in one respect, and one respect only, what is meant by his net earnings. Now that binds the Court, as well as Dr. Greear, as well as the former Mrs. Greear. Now when I determine that, all of your problems concerning community property are in the future. That

may be the end of the problem. The doctor might not have to pay anything, he might find he has to pay, so we have no problem now, but if he does not pay, then the plaintiff is going to seek an execution then, for the first time, the community problems will become involved, as to whether or not community in this State is responsible [118] for a contractual obligation.

Mr. Bartlett: Yes, but your Honor, I will have to take serious issue with your Honor on one point.

The Court: I assume you will take serious issue on everything.

Mr. Bartlett: No, your Honor. I think that there is a real serious question before the Court at this time as to whether or not the fact that we have a community income under the community property law in this State and therefore all earnings after marriage of either spouse go into community property, that when you have an agreement drawn in a State where they do not have a community property law, you can't say at that time that the parties understood all of the meanings of the language of the agreement that they were signing, and you can't say, I don't think, that a man can sign an agreement in a non-property State and then be forbidden to go to a community property State to make his living, if he so chooses, and I think you can't say to the spouse, the second spouse, with whom he made money in the community property State, all the other community property wives in this State are entitled to one-half of their hus-

bands' earnings, they pay the taxes on it because it is community earnings. Contrarywise, he is entitled to one-half of their earnings, if they happen to be employed; that your income, your husband makes ten thousand a year, your community income, if your husband has not previously been married and entered an agreement, will be five thousand a year and your husband's [119] will be five thousand a year. But if you marry a man who has entered into an agreement in another State, where he signed the agreement stating that, based upon his income, so much of that income shall be paid when it is a certain rate and so much at a lesser rate and so much at a lesser rate, then under those circumstances you are different from any other wives, because your income goes into that agreement and it is not his income, at least for purposes of determining how much to pay the former wife.

The Court: When the execution is issued, she can present herself and assert her community interest in there. That is inevitable.

Mr. Bartlett: All right, your Honor, that is the wife. How about the husband? He has signed an agreement, at the time he knew nothing about community property, probably knew nothing about coming to a State where they had it. He signs an agreement, such as he did here, so that at the figure of $17,500 he pays $600 a month, plus certain other monies, and say he makes eighteen thousand. Now nine thousand of that does not belong to him. That belongs to his new wife. Six thousand, if your Honor's interpretation is correct, six thousand of it be-

longs immediately to the ex-wife under the terms of that agreement, and I do not know how much belongs to the children, they have not computed that, but it seems to me immediately the man is to be in a position where he can not possibly get by, except if his present wife chooses to support the community with her half of the funds. Now [120] maybe that is as it should be and maybe that is as it shouldn't be; nevertheless, I think when a husband takes up his earnings—I can see some very bad results if the Court's final ruling is that community income is what measures this term, "his gross income" from all sources, if their community income is what measures that, then as a matter of logic in this case, if Mrs. Greear were now working and bringing five hundred dollars a month into the community, and logically you have to say that is community income, all community income, because the agreement, your Honor, never does say anything about net earnings or anything like that. I think that is possibly read into the agreement, but I honestly do not see how the Court can escape deciding this question in this proceeding here—should the Doctor's income and Mrs. Greear's be used to measure the amount of money Dr. Greear has to pay under this agreement, and I think it is just as pertinent, when you use that measuring stick, just as logical, if she had community income as when you take his entire earnings. I can conceive a place where he wouldn't make enough to comply with the agreement each year and pay his income taxes. That, I think your Honor, is the

practical measuring stick to interpret this agreement.

The Court: At the time the agreement was entered into should determine in the light of the law of the jurisdiction where this agreement was entered into, and then you start searching the document itself. Let me point out that this contract, in a great many respects, [121] is very definite and very detailed. It starts with $17,500 and carried a sliding scale down under $7200 and every contingency is provided for, so one can assume that the respective parties, through competent counsel, had pretty well determined every one of the happenstances. Now net income is even defined, and that is something you do not find very often. You find the definition of what royalty consists of in a mining agreement, but I think probably this is unusual in a property agreement. The meaning of that phrase is gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and tax payments for the year. Now as you say, neither of the parties had any contemplation of the community property law at that time, so we must assume it wasn't made in contemplation of community property effect. But I still keep very definitely divorced the matter of reversing a judgment from the matter of contruing this contract. In one you have to meet the community property problem, in the other, in construing, as it is bound by it, it is merely one of the weights which you say the Court should consider in arriving at the construction.

Mr. Bartlett: Yes, I think that, your Honor. In other words, the agreement certainly was entered into without [122] thought that Dr. Greear would be earning fees where one-half of those fees would belong, as a matter of law, to his new spouse. It was entered into without any thought that if the new spouse contributed her earnings to the community that they might possibly be used as a measuring stick. With that thought in mind, it seems very clear that if Dr. Greear is now forced into the unconscionable position where he cannot make his income—his income has about reached the state where I think it can be demonstrated by paying his income tax, paying six thousand to her and trying to pay the judgment back in Virginia, which incidentally was based upon a decision where the question of community property was not raised—would put him in a position where, unless his wife helped out of her share of the community, he just wouldn't be able to get along, and I do not think, let us say, had that been explained to the parties at the time, then you might say he entered into this agreement by his own free choice and he must be bound by it.

The Court: Yes, but isn't that the very assumption, that everyone enters into an agreement knowing what he is doing? He is advised by counsel. If I enter into an agreement that works out a hardship on me, that is no reason why the Court should set it aside, unless fraud is committed or something like that. You know that; I can't move.

Mr. Bartlett: On the other hand, if you sign an

[123] agreement, not having any idea as to one factor, if the factor is left out of the agreement, something completely different and new——

The Court: You are talking about reformation now.

Mr. Bartlett: No, I am not. If it is left out of the statement. Your Honor has stated that they obviously did not consider community property. Certainly they did not. The question is, if they had considered, would they have drawn this same type of agreement, or another? Now, not having considered it, then your Honor must weigh the intent of the parties concerning this agreement, as to any weight one way or the other. It seems to me they are now in a position of strictly a legal interpretation of what is Dr. Greear's gross income, when he makes his living here in the State of Nevada and when he is married to some one else. What does the law say his gross income is, because obviously the parties could not by definition define a term when they didn't know what type of income they are talking about.

The Court: Suppose the Doctor had continued—this, of course, is all discussion—suppose that Dr. Greear had stayed in Washington, D.C. and continued to practice there and there was no problem of community property, then the contract would be construed just the way it reads.

Mr. Bartlett: That is correct.

The Court: All right. Now that was the place [124] where the parties entered into the contract, where they both lived and the law that they were

both familiar with and as long as Dr. Greear stayed there, there would be no confusion as to the interpretation of what his earnings were. Now he comes to Nevada and you have advanced the argument that by virtue of the community property law in Nevada, his income is only half of what it is. Now surely that was not in contemplation of the first Mrs. Greear when she signed the agreement. It might have been in the contemplation of Dr. Greear at the time he signed it, but we will assume it wasn't in his contemplation either, so then you come to this situation, that the final interpretation and construction of the contract is based upon accident and chance, wherever the defendant might be. Suppose he had gone into a state, if we can conceive of such a situation, that just nullified property settlement agreements so they wouldn't be recognized. Of course, that is an assumption, but a party to a contract can't wander around the face of the earth, whether by chance or by design, and then compel the Court to interpret [125] a contract in the light most favorable to him.

Mr. Bartlett: That is certain, your Honor, and I think the fact that Dr. Greear remained in Washington more than a year is rather good evidence of the fact that he didn't have any thoughts about community property either.

The Court: Well, I am sure he didn't.

Mr. Bartlett: But at the same time it seems to me that if you are to give any meaning to the law of the State of Nevada concerning what is and what is not community income and what is the legal

effect of that income, that then you must allocate to the husband as his income one-half of what the community earns, and to the wife one-half of what the community earns as her income. Now then you go to this agreement and the phraseology that his gross income is the husband's actual income from all sources. Now certainly at that time they didn't have any contemplation that they could take, in measuring this, any lawful income of the present Mrs. Greear, because she wasn't then married to Dr. Greear. They couldn't take into consideration any of her lawful income in arriving at this figure. First, we look and determine what is her lawful income. Her lawful income is her separate property from earnings of the community, whether she or the Doctor earns it, so as a matter of sheer logic, if you put her income into this contract, I think you are reading in something that didn't exist. Maybe the parties didn't contemplate any such situation arising. It could be they didn't contemplate Dr. [126] Greear even getting a Nevada decree of divorce, but these things have happened and I think we now have to read the contract in the light of the things that have happened. Then we have a measuring device of the husband's actual net income and I don't think it would be improper for the Court, in arriving at the valuation point to use any lawful income of the present Mrs. Greear, and then the question is simply this, does the community income in this State constitute a part of her legal income or Dr. Greear's income.

The Court: That is exactly the target. Now I am

going to give you an opportunity for 30 days to advise the Court by memorandum of any cases you have. That is the essence of the case.

Mr. Garroway: May I have just one word?

The Court: Yes.

Mr. Garroway: I would like in the memorandum of the plaintiff if the plaintiff will set forth exactly what she is asking for in this proceeding. I am frank to say I am a little bit right now vague as to what she wants, based upon the complaint and evidence, so I would like to know just exactly, in a few short sentences, in the brief, what it is the plaintiff is claiming now in this action, and I think plaintiff would not have any objection to setting that forth to us.

Mr. Johnson: None whatsoever.

The Court: Do you mean in dollars and cents, or in [127] legal relief?

Mr. Garroway: Legal relief, and therefore the question before the Court.

The Court: I think you have the one point before the Court, speaking of whether or not, by virtue of the community law in the State of Nevada, that factor is to be taken into consideration in construing the meaning of the expression, "net income" as used in the contract. That is one thing. Now having passed on that, the rest of it is just calculation, isn't that correct?

Mr. Garroway: That is right.

The Court: Will you gentlemen stipulate then that this is the only question the Court will be required to pass on?

Mr. Garroway: That has to do with the amount he is to pay in this case?

The Court: Yes.

Mr. Johnson: Not entirely, because there is one cause of action relative to prayer for payments to reimburse the wife for sending the child to school, in addition to which there was a sum of a certain amount for monies which were incurred.

Mr. Garroway: Anyway, that is what I had in mind, no evidence or testimony and now it is just a matter of law. That is why I would like that point argued in the opening brief, as [128] well as the questions before the Court just now.

The Court: As far as what is before the Court, that is very simple. The basic point we are reaching from the testimony, other than probably comments in the briefs or allegations in the pleading, as to matters of schooling and allowances——

Mr. Garroway: Can the Court rule now that that question is entirely beside the case?

The Court: Well, the Court won't rule now, but you can treat it with as much respect as you feel it is entitled to. I personally do not think it is entitled to a great deal of weight at the present time, but I have been frequently in the embarrassing position where I would have to reverse my thinking after analyzing the briefs.

Mr. Garroway: Is it understood the plaintiff will file the opening brief and we will answer?

The Court: Yes, 30 days for the opening brief, 20 days for answering and if the defendant wants to reply 10; 30-20-10.

Mr. Johnson: May I ask this question, on this community property theory, it is not the intent of the Court to go behind the Virginia judgment, is it?

The Court: I think the Virginia court, of course, had no anticipation of the theory with which we are [129] concerned and went right along on the common law theory proposition. [130]

PLAINTIFF'S EXHIBIT No. 4

[Letterhead of Semenza & Kottinger, Certified Public Accountants, Reno, Nevada.]

February 27, 1957

Mr. James W. Johnson, Jr.
Attorney at Law
206 North Virginia Street
Reno, Nevada

Re: Mrs. Mary Schaaf Greear

Dear Mr. Johnson:

We have made an examination to determine the net income of Dr. James N. Greear, Jr., for the years 1952 through 1955 giving consideration to the expenses allowable as outlined in the agreement entered into between Dr. James N. Greear, Jr., and Mary Schaaf Greear, dated July 13, 1949. Our examination was made from data submitted by Dr. Greear's office consisting of bank statements, deposit slips, check stubs, cancelled checks and Federal income tax returns for the years mentioned.

Plaintiff's Exhibit No. 4—(Continued)

Income as recorded was in agreement with that reported in the Federal tax returns for the respective years.

The expenses as presented in the attached statement were determined by an analysis of checks written by Dr. Greear for the periods mentioned above. We were not furnished paid invoices supporting the various disbursements but we did have an opportunity to see cancelled checks covering these expenditures. We also discussed various expenditures with Dr. Greear and his accountant to determine the reason for the disbursement and whether it was applicable to the operation of his office.

The following comments relating to the expenses listed in the attached statement are submitted for your consideration:

The salaries paid were for services of a receptionist.

Dues and memberships consisted of yearly fees covering membership in various professional organizations to which Dr. Greear belongs. Such expenses are usual among professional men.

Entertainment expense for the year 1955 was estimated by Dr. Greear on the basis of $60.00 per month. Other medical men, whose accounts we have examined, incur entertainment expense and the amount estimated by Dr. Greear appears to be comparable based on the gross income reported.

Expenditures for medical meetings consist of expenses paid directly by check, such as transporta-

Plaintiff's Exhibit No. 4—(Continued)

tion costs and hotels, while the arbitrarily allocated items cover an estimated expenditure for meals and entertainment of other persons in attendance of $35.00 per day, while traveling, for a period of ten days in 1953, $40.00 per day for 39 days for the year 1954 and 29½ days at $45.00 per day for the year 1955. We were not able to determine the days involved in 1952. We are in no position to offer any comment on the amount claimed except to state that there was no verification of the expense nor of the days involved. We do know that professional men attend conventions and meetings in connection with their profession and expense is incurred in attending such meetings.

Insurance consists of malpractice coverage and fire insurance on office equipment and contents.

Auto expenses and depreciation for the years 1953, 1954, and 1955 represents 100% usage of Dr. Greear's automobile in his practice.

The interest paid on a loan, the proceeds of which was used to set up his office and provide for equipment, is reflected as expense of the office.

The other expenses listed, but on which we did not comment, are normal office expenses which are incurred in the operation of an office.

We noted in the brief submitted by Mr. Stuart B. Carter to the Circuit Court of Bath County, Virginia, that taxes other than income tax payments, medical society dues, medical conventions and meetings, medical journals and books, physician's liability insurance, auto expenses including

Plaintiff's Exhibit No. 4—(Continued)

depreciation, and interest, were not allowable deductions. It is our opinion that such items can be ordinary and necessary expenses of operating a professional office such as Dr. Greear's, as long as they apply to the production of professional income, however, if they are determined to be unallowable deductions they may be removed from our statement.

We call your attention to the fact that the income reflected in the attached statement is solely that of Dr. Greear, as we have eliminated the separate income of the present Mrs. Greear in preparing the computation. It has also been necessary for us to reduce the deduction for income tax paid by Dr. Greear in the respective years, by the amount of tax applicable to the separate income of Mrs. Greear which was included in the joint income tax return filed by Dr. and Mrs. Greear.

Subject to the foregoing comments and exceptions it is our opinion that the attached statement reflects Dr. Greear's net income for the years 1952 through 1955.

Yours very truly,

SEMENZA & KOTTINGER.

LJS/vys

Plaintiff's Exhibit No. 4—(Continued)

DR. JAMES N. GREEAR, JR.
STATEMENT OF INCOME AND EXPENSES FOR THE YEARS 1952 THROUGH 1955

Income	1952	1953	1954	195
Professional fees	$23,496.85	$31,023.25	$33,324.00	$35,674
Joint Venture:				
Ordinary income or (loss)		(14.37)	12.85	(17
Dividends			27.05	28
Capital gains		5.80	36.29	120
Total income	23,496.85	31,014.68	33,400.19	35,805
Expenses of Operating Office				
Salaries	2,637.50	2,775.00	2,716.25	2,782
Rent	2,480.00	2,520.00	2,520.00	2,520
Dues and memberships	618.00	428.50	606.75	359
Entertainment	—	—	—	72C
Medical meetings—				
Direct expense	987.61	1,140.23	816.81	1,741
Arbitrarily allocated	630.00	350.00	1,560.00	1,327
Drugs and supplies	1,075.56	613.58	487.89	411
Repairs	87.86	14.55	32.98	32
Laundry	43.97	34.86	35.07	15
Telephone	582.62	630.21	838.88	723
Office supplies and postage	582.19	1,070.92	629.84	874
Payroll taxes	100.20	116.53	143.89	75
Personal property taxes—				
Office	113.75	50.00	50.00	5C
License and registration				
fees	44.00	80.00	85.00	9C
Medical journals	109.95	52.40	179.00	101
Professional insurance	136.54	168.70	111.50	256
Professional services—				
Accounting	40.00	45.00	100.00	125
Dictation and transcribing	83.64	—	—	—
Office moving expense	94.75	—	—	—
Interest	270.97	551.79	547.73	580
Auto expense	562.43	210.50	816.19	759
Depreciation	662.37	993.60	1,025.00	1,012
	11,943.91	11,846.37	13,302.78	14,561
Dr. Greear's net income	11,552.94	19,168.31	20,097.41	21,244

Plaintiff's Exhibit No. 4—(Continued)

uct:	1952	1953	1954	1955
come tax for year	2,821.66	5,903.68	4,294.54	4,281.14
: Adjustment for ortion applicable to ife's income ....(	396.44) (	1,073.88) (	219.45) (	22.69)
	2,425.22	4,829.80	4,075.09	4,258.45
income	$ 9,127.72	$14,338.51	$16,022.32	$16,986.09

PLAINTIFF'S EXHIBIT No. 5

[Letterhead of Semenza & Kottinger, Certified Public Accountants, Reno, Nevada.]

March 5, 1957

Mr. James W. Johnson, Jr.
Attorney at Law
206 North Virginia Street
Reno, Nevada

Re: Mrs. Mary Schaaf Greear

Dear Mr. Johnson:

We have made an examination to determine the income of Dr. James N. Greear, Jr., for the years 1952 through 1955 giving consideration to the expenses allowable as outlined in the agreement entered into between Dr. James N. Greear, Jr., and Mary Schaaf Greear, dated July 13, 1949. The agreement appears to limit the expenses that can be deducted from Dr. Greear's gross income to the usual, ordinary and reasonable office expenses and

Plaintiff's Exhibit No. 4—(Continued)

DR. JAMES N. GREEAR, JR.
STATEMENT OF INCOME AND EXPENSES
FOR THE YEARS 1952 THROUGH 1955

Income	1952	1953	1954	1955
Professional fees	$23,496.85	$31,023.25	$33,324.00	$35,674.80
Joint Venture:				
Ordinary income or (loss)		(14.37)	12.85	(17.63)
Dividends			27.05	28.13
Capital gains		5.80	36.29	120.37
Total income	23,496.85	31,014.68	33,400.19	35,805.67
Expenses of Operating Office				
Salaries	2,637.50	2,775.00	2,716.25	2,782.50
Rent	2,480.00	2,520.00	2,520.00	2,520.00
Dues and memberships	618.00	428.50	606.75	359.96
Entertainment	—	—	—	720.00
Medical meetings—				
Direct expense	987.61	1,140.23	816.81	1,741.03
Arbitrarily allocated	630.00	350.00	1,560.00	1,327.50
Drugs and supplies	1,075.56	613.58	487.89	411.58
Repairs	87.86	14.55	32.98	32.75
Laundry	43.97	34.86	35.07	15.99
Telephone	582.62	630.21	838.88	723.51
Office supplies and postage	582.19	1,070.92	629.84	874.97
Payroll taxes	100.20	116.53	143.89	75.00
Personal property taxes— Office	113.75	50.00	50.00	50.00
License and registration fees	44.00	80.00	85.00	90.00
Medical journals	109.95	52.40	179.00	101.61
Professional insurance	136.54	168.70	111.50	256.82
Professional services— Accounting	40.00	45.00	100.00	125.00
Dictation and transcribing	83.64	—	—	—
Office moving expense	94.75	—	—	—
Interest	270.97	551.79	547.73	580.11
Auto expense	562.43	210.50	816.19	759.84
Depreciation	662.37	993.60	1,025.00	1,012.96
	11,943.91	11,846.37	13,302.78	14,561.13
Dr. Greear's net income	11,552.94	19,168.31	20,097.41	21,244.54

Plaintiff's Exhibit No. 4—(Continued)

Deduct:	1952	1953	1954	1955
Income tax for year	2,821.66	5,903.68	4,294.54	4,281.14
Less: Adjustment for portion applicable to wife's income	(396.44)	(1,073.88)	(219.45)	(22.69)
	2,425.22	4,829.80	4,075.09	4,258.45
Net income	$ 9,127.72	$14,338.51	$16,022.32	$16,986.09

PLAINTIFF'S EXHIBIT No. 5

[Letterhead of Semenza & Kottinger, Certified Public Accountants, Reno, Nevada.]

March 5, 1957

Mr. James W. Johnson, Jr.
Attorney at Law
206 North Virginia Street
Reno, Nevada

Re: Mrs. Mary Schaaf Greear

Dear Mr. Johnson:

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Plaintiff's Exhibit No. 5—(Continued)

DR. JAMES N. GREEAR, JR.
STATEMENT OF INCOME AND EXPENSES
FOR THE YEARS 1952 THROUGH 1955

Income	1952	1953	1954	1955
Professional fees	$23,496.85	$31,023.25	$33,324.00	$35,674.80
Joint Venture:				
Ordinary income or (loss)		(14.37)	12.85	(17.63
Dividends			27.05	28.13
Capital gains		5.80	36.29	120.37
Total income	23,496.85	31,014.68	33,400.19	35,805.67
Expenses of Operating Office				
Salaries	2,637.50	2,775.00	2,716.25	2,782.50
Rent	2,480.00	2,520.00	2,520.00	2,520.00
Drugs and supplies	1,075.56	613.58	487.89	411.58
Repairs	87.86	14.55	32.98	32.75
Laundry	43.97	34.86	35.07	15.99
Telephone	582.62	630.21	838.88	723.51
Office supplies and postage	582.19	1,070.92	629.84	874.97
Payroll taxes	100.20	116.53	143.89	75.00
Personal property taxes—Office	113.75	50.00	50.00	50.00
License and registration fees	44.00	80.00	85.00	90.00
Professional services and Accounting	40.00	45.00	100.00	125.00
Dictation and transcribing	83.64	—	—	—
Office moving expense	94.75	—	—	—
	7,966.04	7,950.65	7,639.80	7,701.30
Dr. Greear's Net Income	15,530.81	23,064.03	25,760.39	28,104.37
Deduct:				
Income tax for year	2,821.66	5,903.68	4,294.54	4,281.14
Less: Adjustment for portion applicable to wife's income	(396.44)	(1,073.88)	(219.45)	(22.69
	2,425.22	4,829.80	4,075.09	4,258.45
Net income	$13,105.59	$18,234.23	$21,685.30	$23,845.92

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced at the trial of the case entitled, Mary Schaaf Greear, Plaintiff, vs. James N. Greear, Jr., Defendant, No. 1261, held in Carson City, Nevada, March 5, 1957, and that the foregoing pages, numbered 1 to 82, inclusive, comprise a true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, May 26, 1958.

/s/ MARIE D. McINTYRE,
Official Court Reporter.

[Endorsed]: Filed May 26, 1958.

[Endorsed]: No. 16062. United States Court of Appeals for the Ninth Circuit. James N. Greear, Appellant, vs. Mary Schaaf Greear, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: June 19, 1958.

Docketed: June 26, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.